Form No. 7

San Francisco Law Library

No. 88330

Presented by

EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down. or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

WILCOX & CO

No. 6389.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Leonard J. Woodruff,
Appellant,

vs.

Hubert F. Laugharn, as Trustee in Bankruptcy of the Estate of Golden State Gem Company, a corporation, Bankrupt,
Appellee.

BRIEF OF APPELLEE.

ROBERT L. BEVERIDGE,
Attorney for Appellee.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

TOPICAL INDEX.

TABLE OF CASES AND AUTHORITIES CITED.

AUTHORITIES.

No. 6389.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Leonard J. Woodruff,
Appellant,

vs.

Hubert F. Laugharn, as Trustee in Bankruptcy of the Estate of Golden State Gem Company, a corporation, Bankrupt,
Appellee.

BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

This is an appeal by appellant, Leonard J. Woodruff, from findings of fact and conclusions of law of Special Master and order and decree of the District Court of the United States, Southern District of California, Central Division, in favor of appellee, Hubert F. Laugharn, as trustee in bankruptcy of the estate of the Golden State Gem Company, a corporation, bankrupt.

The decisions appealed from follow [Tr. 81]:

"Findings of Fact, Conclusions of Law and Report of Special Master.

Appearances:

Robert L. Beveridge, Esq., for plaintiff (appellee);

J. A. Coleman, Esq., and Edward Fitzpatrick, Esq., for the defendants (appellant).

"This matter was referred to the undersigned as Special Master to make findings of fact, conclusions of law and report on the issues raised by the pleadings. These issues, although requiring a number of tedious days for trial, are not greatly complicated. Up to August 3, 1929, the bankrupt corporation had borrowed from Leonard J. Woodruff, the defendant in interest, all other defendants being his agents or nominal defendants, certain sums of money, the exact amount of which is unknown according to the testimony of the bankrupt's officers and employees. The books of the bankrupt were in its place of business at the time of the foreclosure and sale and the taking possession thereof by the defendant, and while I believe this testimony to be true the books have not been found by the trustee and the defendant's agent testified that he did not find them at the time of the sale and there is no evidence of the destruction of the books by him. The defendant, as will be hereinafter further considered, testified that his books were destroyed by a former secretary, who was not produced nor was any showing made of an effort made to produce him.

"The only checks produced by defendant showing payments to plaintiff prior to the date of the execution of the mortgage, as shown by Defendant's Exhibit H, five in number, total $11,475, and Defend-

ant's Exhibit N, one check for $950, totaling $12,425, and while the note and mortgage were executed by officers of the bankrupt corporation who had no knowledge of the amount due, in the absence of its president and general manager and by reason of the insistence of the defendant and his counsel yet written agreements of the character of this note and mortgage are of such evidentiary value that a finding must be made that the amount due at the time of the execution thereof was $18,000. The defendant produced checks showing the payments to the bankrupt after the execution of the mortgage (Def. Ex. I) amounting to $9,383, and the bankrupt's president admitted that a certain transaction amounted to $10,000, which would add the sum of $1240 to the checks produced, making total advances of $10,623, in addition to the $18,000 due at the time of the execution of the mortgage, a total of $28,623, a principal, for which the defendant has pledged to him the jewelry and semi-precious stones in a safety deposit box at the Security First National Bank of Los Angeles, 7th and Spring streets, Los Angeles, Calif.

"After the defendant testified that he had advanced other sums of money for which he did not have the checks, and that his books had been destroyed by a former secretary, I requested counsel for the plaintiff to have subpoenaed the records of the different banks in which the defendant stated he maintained accounts during this period of time, in order that I might ascertain if there was charged against his bank accounts on or about the dates the defendant claimed to have made such advances any checks in the same amount. This request on the part of the Special Master met with objection of counsel for defendant, and upon the production of the bank records no charges, with two exceptions, one of which was ac-

counted for by a check, were found against defendant's bank accounts comparing with amounts testified by him to have been paid them, for which he could not produce checks. There are instances in which books are destroyed, but there is practically always sources of information from which these books can be rewritten, and there are other means of proving such destruction other than the bare statement of a defendant made under such peculiar circumstances. This defendant is not a man of trivial business affairs, as evidenced by the records of his bank account. For instance, in one bank alone, the predecessor of the Bank of America, he maintained several accounts. In 1927 he deposited over $8000, and up to August 11, 1928, over $52,000. In another account, the First National Bank of Los Angeles (Def. Ex. P and Q-1-2-3-4-5), the following deposits were made:

December 3 to 31, 1926 (Def. Ex. Q-1)	$ 20,850.67
January 13 to 28, 1927 (Def. Ex. Q-2)	1,433.80
March 7 to 30, 1927 (Def. Ex. Q-3)	50.257.43
April 14 to 28, 1927 (Def. Ex. Q-4)	9,284.64
May 5 to 17, 1927 (Def. Ex. Q-5)	15,397.16
August 3 to 30, 1927 (Def. Ex. P)	52,019.74
Total	$149,243.44

"The above are the deposits in one bank for a nine months period, during which period of time in one other bank there was also a further deposit of $8000, and also in another bank, for the year 1928, up to August, over $52,000 was deposited, or total deposits of over $200,000 from December 3, 1926, to August 11, 1928. This is the financial record of a defendant who testified that he made no income tax return during these years and could supply no documentary evidence of his payments to the bankrupt.

"At the time of the execution of the mortgage the largest stockholder and manager of the bankrupt, Calvin Smith, was in the east endeavoring to refinance its affairs, and the defendant and his attorney demanded additional security for the existing indebtedness. In response to a telegram Calvin Smith replied that he had no objections to giving the defendant a mortgage, but asking for an explanation and requested that it be not signed without a further approval from him. The note and mortgage were executed without the holding of a meeting of the board of directors of the bankrupt corporation, without notice to such directors of a meeting or waiver of notice and consent to the holding thereof, are contrary to the requirements of the corporation's by-laws. The security given in the mortgage was the fixtures of the store used by the bankrupt and a large stock of semi-precious stones, jewelry, and mountings, and also the machinery and equipment used by the bankrupt in cutting and polishing stones. The bankrupt, in the operation of its business, occupied two store rooms, one of which was practically all used for the purpose of displaying and selling its merchandise, part of which was purchased ready for sale and part assembled and manufactured by it in the adjoining store room, which was largely occupied by the machinery for the cutting and polishing of stones.

"No argument or citation of authority is necessary to illustrate from these facts that the bankrupt was a merchant, and practically all of the property mortgaged was the stock in trade, furniture and fixtures of a merchant, although some of the stock was in a more or less uncompleted form, yet subject to sale and actually sold by the bankrupt in that form both at wholesale and retail. By reason of the fact that it engaged in manufacturing some of its own jewelry,

as well as jewelry for other parties, and cut and polished these semi-precious stones, it is not taken out of the class of a merchant, nor was the stock in trade which they were selling and had for sale taken out of the class of stock in trade of a merchant. Under section 2955 C. C., a mortgage on the stock in trade of a merchant is prohibited and void from its very inception.

"No notice of intention to execute a mortgage on the fixtures of the bankrupt was given as required by section 3440 C. C., which voided the mortgage as to such articles by reason of the fact that the bankrupt at that time came within the definition of a merchant. Later, after the validity of the mortgage was questioned by creditors, and the defendant, to protect the mortgage and compromise litigation concerning its validity, paid certain creditors, a conspiracy was entered into by the defendant and the president of the bankrupt corporation whereby it was agreed that in order to endeavor to protect the defendant, or in other words, to delay and defraud other creditors of the bankrupt, by securing an adjudication of the state courts as to the validity of the mortgage, the bankrupt permitted an action to foreclose the mortgage to go by default. The very purpose of that action demonstrates its invalidity, and even assuming that the findings of the state courts as to the proper execution of the mortgage could cure the absence of the authorization of such execution by the bankrupt's board of directors as against creditors bearing in mind that this mortgage was executed to give further security for a pre-existing indebtedness (which I do not assume to be the law) such findings and judgment based upon a fraudulent conspiracy cannot be otherwise than void.

"The reason for the foreclosure of the mortgage and the conspiracy between defendant Woodruff and the bankrupt's president is apparent from the evidence showing the endorsement of the bankrupt's note by the defendant (Pl. Ex. 7) to remove the bank as an objector to the mortgage, and the various difficulties which the defendant experienced with other creditors of the bankrupt, which is set forth in the application of J. A. Coleman, defendant's attorney, for fees for extraordinary services rendered in the ordinary services rendered in the foreclosure of the mortgage. [Tr. 262 to 268.]

"It therefore appears that the mortgage was and is void in the following particulars:

"First: As to the stock of merchandise of the bankrupt, which constituted the stock in trade of a merchant, by reason of the prohibition of section 2955 C. C.

"Second: As to the furniture and fixtures of the bankrupt, which was then a merchant, by reason of the absence of a notice of intention to mortgage as required by Sec. 3440 C. C.

"Third: As to the property above described in addition to the reasons therein set forth, and also as to the equipment used for the purpose of cutting and polishing the stones, by reason of the absence of the authorization of the board of directors of the bankrupt corporation for the execution of the mortgage.

"Before the execution of the mortgage and for the purpose of securing the defendant for funds already advanced and then about to be advanced, the bankrupt pledged with him certain jewelry and semi-precious stones, the value of which has not been accurately determined, but alleged to be between $20,000 and $78,000. By reason of the changes in market

conditions its true value will not be known until an effort has been made to effect a sale, but I am thoroughly convinced that the value of this pledged property will not equal the sum of $28,623 due on the pledge.

"Since the purported sale under the foreclosure of the chattel mortgage, the defendant has operated the store of the bankrupt (under trade name of Golden Coast Gem Co.) and no accounting made as to the profits of such operation or the proceeds of the sale of property in the store at the time of the foreclosure and sale. An exact accounting between the parties is difficult, but if this report be approved I recommend that an inventory be immediately taken of the mortgaged premises and that they be operated under the joint control of a representative of the trustee and of the defendant, pending an accounting between the parties, and that the trustee be given a reasonable length of time within which to sell the pledged jewelry and semi-precious stones, if such sale can be effected for a sum sufficient to pay the total amount of the advances of the defendant and interest, and in the event a sale cannot be effected at such price that such pledged property be delivered to the defendant and an accounting had between the parties as to the amount the trustee is entitled to recover from the defendant as the profits from the operation of the mortgaged property and proceeds of sales of portions thereof.

"The Special Master therefore finds as follows, to-wit:

I.

"That all the allegations of plaintiff's complaint are true.

II.

"That there was pledged to defendant Leonard Woodruff, located in a safety deposit box in the Security First National Bank of Los Angeles, 7th & Spring streets, Los Angeles, California, in the name of the defendant, entrance to which has been restrained by an order of the court, jewelry and semi-precious stones, the exact value of which is unknown, as security for the repayment to him of the following sums:

$18,000 with interest thereon at 6% per annum from August 3, 1927, compounded annually, amounting to the sum of $3434.74	$21,434.74
$500 with interest thereon at 7% per annum from December 5, 1927, amounting to the sum of $92.65	592.65
$200 with interest thereon at 7% per annum from February 27, 1928, amounting to the sum of $30.39	230.39
$500 with interest thereon at 7% per annum from April 4, 1928, amounting to the sum of $81.10	581.10
$6783 with interest thereon at 7% per annum from August 15, 1928, amounting to the sum of $928.51	7,711.51
$1200 with interest thereon at 7% per annum from August 15, 1928, amounting to the sum of $164.26	1,364.26
$1240 with interest thereon at 7% per annum from August 15, 1928, amounting to the sum of $169.79	1,409.79
Total	$33,324.44

"From the foregoing findings of fact the Special Master makes the following conclusions of law:

I.

"That plaintiff herein is the owner and entitled to possession of that certain store building situated at number 726 South San Pedro street, Los Angeles, California, together with such furniture, fixtures, equipment, stock in trade, and property of every kind or character as described in the said mortgage and in the said place of business at the time of the foreclosure of said mortgage.

II.

"That plaintiff is entitled to a reasonable length of time in which to make a sale of the said jewelry and semi-precious stones located in the safety deposit box at the Security First National Bank of Los Angeles, 7th and Spring streets, Los Angeles, California, in the name of the defendant, provided said sale can be made for a sum sufficient to pay defendant Leonard Woodruff all sums due him on principal and interest as found herein, and in the event said sale cannot be made that said property be delivered to defendant Leonard Woodruff.

III.

"That plaintiff is entitled to an accounting from defendant Leonard Woodruff as to such property as was in the said place of business of said Golden State Gem Company on the date of the foreclosure of the sale and sold by said defendant, and for the profits of the operation of said business.

"The Special Master asks that for his services rendered herein he be allowed a fee of $350, and that a confirmation of this report constitute an approval of such allowance.

"The Special Master transmits with this report the following documents:

"1. Pleading file, containing all the pleadings.

"2. Exhibit file, containing Plaintiff's Exhibits I to II inc., and Defendant's Exhibits A to Q inc.

Dated July 29, 1930.

Respectfully submitted,

(Signed) EARL E. MOSS,
Special Master."

After appellee filed exceptions to the foregoing findings of fact and conclusions of law, upon hearing thereon, September 17th, 1930, the District Court decided as follows [Tr. 385]:

"The exceptions of Leonard J. Woodruff, to findings of fact, conclusions of law, and report of Special Master herein, are and each is, overruled and denied, and an exception is hereby noted for said defendant to each of the aforesaid rulings, and it is accordingly ordered that findings of fact, conclusions of law, and report of Special Master, be, and the same are hereby confirmed and adopted as the decision of this court, and it is ordered that the Special Master herein be allowed a fee of three hundred and fifty dollars ($350.00) for services as such Special Master to the date hereof; and it is further ordered that a decree be entered herein pursuant to the report of said Special Master and as recommended therein, and sixty (60) days from the date of said decree is hereby determined to be a reasonable length of time in which to make a sale as recommended in said Master's report and in paragraph II of the Conclusions of Law therein; and Earl E. Moss, Esq., be and he is hereby appointed Special Master for the purpose of taking and making the accounting hereby ordered, pursuant to paragraph III of the Conclusions of Law and the report of said Special Master herein. The said decree

hereby ordered, to be with costs to plaintiff herein. Solicitors for paintiff will accordingly prepare, serve, and present for signing and entry herein, a decree in accordance with the foregoing order and pursuant to said report of said Special Master under the rules of this court. Dated at Los Angeles, California, September 17th, 1930."

In accordance with the foregoing order the following decree was rendered October 4th, 1930 [Tr. 386]:

"Decree and Special Reference for Final Judgment.

"The above entitled matter came on regularly for hearing September 2nd, 1930, in the above entitled court, Honorable Paul J. McCormick, Judge, presiding, plaintiff appearing by Robert L. Beveridge, Esq., of counsel, and the principal defendants Leonard Woodruff, trading as Golden Coast Gem Co., Leonard Woodruff individually, and J. T. Carroll as agent for Leonard Woodruff, trading as Golden Coast Gem Co., appearing by their attorneys Messrs. John A. Coleman and Edward Fitzpatrick, and the action being dismissed as to the nominal defendants, Golden State Gem Co. of Nevada, a corporation; Walter Calvin Smith, C. R. Buck and A. S. Devoll, upon the issues made up by the following pleadings and proceedings herein:

"Upon plaintiff's original petition; separate motions to dismiss as to defendants Leonard Woodruff, trading as Golden Coast Gem Co., Leonard Woodruff individually, and J. T. Carroll; separate answers of Leonard Woodruff and J. T. Carroll; demurrer of plaintiff to each of said separate answers; separate amended answers of defendants Leonard Woodruff and J. T. Carroll; plaintiff's demurrer and motion to

strike said separate answers; plaintiff's motion to have cause referred to a Special Master for findings of fact and conclusions of law, an order having been entered referring said matter for trial to E. E. Moss as Special Master to report his findings of fact and conclusions of law; on the preliminary report of Special Master including his oath of office and recommending granting permission to plaintiff to amend petition; upon plaintiff's motion for leave to file amended petition; upon the separate motions of defendants Leonard Woodruff and J. T. Carroll to dismiss said amended petition; upon the court's order re-referring said matter to E. E. Moss, Special Master, to hear and determine all questions of law and fact and report thereon; upon the court's order granting plaintiff leave to file an amended petition; upon plaintiff's amended petition and separate answers of the defendants Leonard Woodruff and J. T. Carroll thereto; upon the report and findings of fact and conclusions of law of the Special Master finding in favor of plaintiff herein; upon nine volumes of the transcript of evidence taken before the Special Master; upon the fifteen exceptions to the report of the Special Master taken by the defendants Leonard Woodruff and J. T. Carroll; upon the argument of respective counsel; upon all issues of fact and law raised by the aforesaid pleadings and reports, each side having submitted points and authorities of law and fact in support of their respective contentions herein, said matter having been by this court taken under submission on the date first above mentioned, and the court having been fully advised in the premises and having considered the issues raised by law in the pleadings and reports herein, and having considered the exceptions of the defendants Leonard Woodruff and J. T. Carroll to the findings of fact, conclusions

of law and report of Special Master, and having entered a minute order September 17th, overruling and denying the same,

"Now wherefore, by reason of the order that the findings of fact and conclusions of law and report of Special Master have been confirmed and adopted as the decision of this court, it is ordered, adjudged and decreed that the plaintiff have and recover judgment against the defendants Leonard Woodruff, trading as Golden Coast Gem Co., Leonard Woodruff individually, and J. T. Carroll, agent for Leonard Woodruff, trading as Golden Coast Gem Co., as follows:

"Plaintiff herein is the owner and entitled to possession of all of the property described in the chattel mortgage attached to plaintiff's petition wherever situated and for judgment for value thereof for such property as defendants or either of them are unable to surrender in accordance with this decree;

"That plaintiff be allowed sixty days from the date hereof in which to make a sale of that certain pledged jewelry and semi-precious stones located in the safety deposit box at the Security First National Bank of Los Angeles, 7th & Spring streets, Los Angeles, California, in the name of the defendant Leonard Woodruff, and it is further ordered that if said sale cannot be made for a sum sufficient to pay the defendant Leonard Woodruff the sum of thirty-three thousand, three hundred and twenty-four and 44/100 dollars ($33,324.44) and interest as found due him in the Special Master's report, then and in that event plaintiff herein is to deliver said property to defendant Leonard Woodruff in full and complete settlement of his pledge; that in the event said sale can be made for a sum so found due, then and in that event the residue thereof shall be used by plaintiff herein together with other sums coming into his hands to be distributed

among the creditors of the bankrupt estate, Golden State Gem Co., a corporation.

"It is further ordered, adjudged and decreed that said chattel mortgage as in plaintiff's complaint referred to be set aside; that the judgment resulting from the foreclosure proceedings thereof be decreed to have been procured by a fraudulent conspiracy and is void; that the sale that resulted from said foreclosure proceedings is hereby set aside and held for naught.

"It is further ordered, adjudged and decreed that E. E. Moss, Esq., be and he is hereby appointed Special Master for the purpose of receiving the report of plaintiff herein as to his sale or disposition of the pledged jewelry and semi-precious stones as herein authorized to be sold and disposed of, and for the further purpose of taking and making an accounting from the defendants Leonard Woodruff and J. T. Carroll, as to such property described in the said chattel mortgage as was in the said place of business of said Golden State Gem Co., a corporation, bankrupt herein, on the date of the foreclosure and subsequent sale thereof to said defendant Leonard Woodruff, and for the profits of the operation of such business.

"The said E. E. Moss, Esq., as such Special Master is hereby directed and authorized to report the result of plaintiff's doings in the matter of the sale or disposition of said pledged jewelry and semi-precious stones, and the result of his accounting and findings in the matter of the property covered by the chattel mortgage herein set aside for the further consideration and final judgment of this court; and

"It is further ordered, adjudged and decreed that the plaintiff, Hubert F. Laugharn, as trustee in bank-

ruptcy of the estate of Golden State Gem Co., a corporation, bankrupt, do have and recover judgment from the defendants Leonard Woodruff, trading as Golden Coast Gem Co., Leonard Woodruff individually and J. T. Carroll, agent for Leonard Woodruff, trading as Golden Coast Gem Co., for his costs, expenses and disbursements herein incurred as follows: Three hundred and fifty dollars ($350.00) for expenses for the services of E. E. Moss, Esq., Special Master herein, for costs and disbursements as shown by plaintiff's memorandum of costs and disbursements herein filed and as assessed herein at $123.99 [Tr. 392], as well as judgment for accruing costs, expenses and disbursements to effect final judgment herein, as may be hereinafter allowed.

"Dated this 4th day of October, 1930.

By the Court.

PAUL J. MCCORMICK,
U. S. District Judge."

Recorded and entered Oct. 13, 1930.

The case that resulted in these decisions was started in the said District Court of the United States, Southern District of California, Central Division, at Los Angeles, California, January 2nd, 1930, when and wherein appellee sued appellant and others, in a plenary proceeding, arising out of the bankruptcy proceedings of the Golden State Gem Company, a corporation, bankrupt, to recover for the benefit of creditors of said bankrupt estate assets alleged and proved to have been fraudulently transferred by bankrupt corporation to appellant to defraud creditors of bankrupt corporation in existence at said time.

The said transfer so alleged and proved to have been fraudulent, and accordingly decreed by the trial court and

the said District Court to have been void, consisted of a chattel mortgage, executed and delivered by bankrupt corporation to appellant August 3rd, 1927, to secure an alleged promissory note covering all of bankrupt corporation's stock in trade, furniture, numerous stones, and jewelry merchandise, fixtures and machinery, equipment and personal property, located at its then place of business, 726 South San Pedro street, Los Angeles, California.

An attempt was made by appellant and the bankrupt corporation to cure the legal defects of said transfer, as are more fully hereinafter referred to, by clearing said chattel mortgage in the Superior Court of Los Angeles county through default foreclosure proceedings and at a sale thereunder said property was bid in by appellant to satisfy the alleged indebtedness of eighteen thousand dollars ($18,000.00). These proceedings resulted from a conspiracy between bankrupt corporation and appellant to hinder, delay and defraud creditors of bankrupt corporation whose claims were in existence at said time and as yet unpaid, which said claims are now on file against bankrupt estate.

THE ISSUE.

Is the chattel mortgage in question and the subsequent sale under foreclosure proceedings thereof void, as having resulted from a conspiracy between appellant and bankrupt corporation to hinder, delay and defraud bankrupt corporation's creditors, and having been executed in violation of, and by failing to comply with sections 2955, 3440 and 320 (a) of the Civil Code of the state of California, and for want of proper authority and consideration?

In rendering the above decisions the Special Master and the District Court answered this issue in the affirmative finding that the chattel mortgage and the sale under the foreclosure thereof were void in the following particulars:

FIRST: As to the stock of merchandise of bankrupt, which consisted of the stock in trade of a merchant, by reason of the prohibition of section 2955 of the Civil Code of the state of California.

SECOND: As to the furniture and fixtures of the bankrupt, which was then a merchant, by reason of the absence of the recordation of a seven-day notice of intention to mortgage as required by section 3440 of the Civil Code of the state of California.

THIRD: The execution of said chattel mortgage was not regularly authorized at a meeting of the board of directors of bankrupt corporation or at all, as provided by its by-laws (sections 8 and 9).

FOURTH: That at the said time appellant had seventy-eight thousand dollars' ($78,000.00) worth of pledged property in his possession belonging to bankrupt corporation as security for indebtedness owing, and accordingly there was no consideration for said chattel mortgage and same was given by bankrupt corporation to appellant to hinder, delay and defraud its creditors whose claims were in existence at said time and are still unpaid.

FIFTH: With reference to the foreclosure of said chattel mortgage and the sale thereunder, the same resulted from an agreement and conspiracy between appellant and bankrupt corporation to permit said proceedings to go by default to defraud the creditors of bankrupt corporation then in existence whose claims are now on file against bankrupt estate.

ANSWER TO APPELLANT'S ASSIGNMENT OF ERRORS.

In answer to appellant's assignment of errors an examination of the record will disclose that he is precluded from setting forth Proposition I, for the following reasons:

Before the case had been referred to a Special Master by order of the District Court [Tr. 45] under date of May 15th, 1930, for trial, the sufficiency of the original complaint had been passed upon by said District Court by the denial of a motion for a dismissal in the nature of a demurrer, February 17th, 1930.

However, out of consideration for some points raised by counsel for appellant, Special Master made a most careful examination of the allegations in appellee's complaint with reference to his objections to the introductions of any evidence on the ground that the complaint did not state facts sufficient to constitute a cause of action.

The motion for a dismissal before the Special Master was out of order for the sufficiency of the complaint had already been determined before the reference and the evidence accordingly should have been received without the long dissertation and final decision to amend.

Although the Special Master did not take into account that the sufficiency of the complaint had previously been settled by the District Court, nevertheless, as a master in chancery, under a general order of reference, he has the right to make what inquiries of the witnesses he deems proper or make any recommendations he may see fit to either party in the litigation regarding amendments to pleadings.

The amendment, however, referred to was not made on the motion or at the suggestion of the Special Master, but was made on motion of counsel for appellee and leave therefor was granted by the District Court. The only recommendation of the Special Master was that the permission for leave to amend by appellee be granted by the District Court. [Tr. 46 and 48 to 54.]

With reference to appellant's second assignment of error, to-wit: that the District Court erred in overruling and denying appellant's motion to dismiss plaintiff's original petition filed herein, this assignment of error is meaningless inasmuch as the case proceeded to trial based on an amended complaint that was thereafter allowed to be filed by the District Court.

With reference to appellant's third assignment of error, to-wit: that the District Court erred in overruling and denying appellant's motion to dismiss plaintiff's amended complaint filed herein, a perusal of said amended complaint [Tr. 54] will show conclusively that facts sufficient to constitute a cause of action in substance have been stated as follows:

(a) That during the time referred to in the complaint bankrupt corporation was engaged in the business of a wholesale and retail jewelry merchant and was accordingly subjected to the provisions of section 3440 and bound by the prohibition of section 2955, paragraph III of the Civil Code of the state of California, in the matter of mortgaging any of its personal property;

(b) That said chattel mortgage was not regularly authorized by directors of bankrupt corporation;

(c) That it was fraudulent and void in that it did not comply with section 3440 of the Civil Code of the state of California, and violated the prohibition of section 2955, paragraph III of the Civil Code of the state of California in that it attempted to mortgage the stock in trade, furniture and fixtures of a merchant, it having been alleged that the bankrupt corporation was a wholesale and retail jewelry merchant;

(d) That the subsequent foreclosure of said chattel mortgage and sale thereunder resulted from a conspiracy between appellant Leonard Woodruff and bankrupt corporation to permit said proceedings to go by default to hinder, delay and defraud creditors then in existence and to prevent the then existing judgment creditors from levying execution upon the property of bankrupt corporation. Appellee's second cause of action was withdrawn from the amended complaint for the reason that the subject matter thereof could be disposed of in summary proceedings in the bankrupt's estate proper, the court's attention being called to the fact that the Special Master who tried this case is the same person as the referee in bankruptcy proceedings. However, the Special Master ruled on the subject matter thereof in his decision for the reason that he had jurisdiction of the "*res*" and the parties concerned in the original and amended complaint as follows:

While the evidence shows that the bankrupt corporation did actually owe defendant Leonard Woodruff eighteen thousand dollars ($18,000.00) or more, it further shows conclusively that this money was given at a prior time than the date of the chattel mortgage but that to secure the same at such time the money was advanced to bank-

rupt corporation by the defendant Leonard Woodruff, appellant herein, bankrupt corporation pledged stock in favor of Leonard Woodruff in the amount of approximately seventy-eight thousand dollars ($78,000.00), which said stock was taken by defendant Leonard Woodruff as security for said indebtedness, and the said chattel mortgage given practically two years thereafter was merely to prevent judgment creditors from levying execution upon the property of bankrupt corporation and/or to hinder, delay and defraud the creditors whose claims were not in judgment.

In order to answer assignment of error IV, in which appellant states that the Special Master erred in making findings of fact I, being as follows, to-wit:

> "That all the allegations of plaintiff's complaint are true,"

it will be necessary to somewhat briefly review the evidence of the witnesses and accordingly the evidence will not be set forth in any other section of this brief:

Mrs. Cary E. Buck, appellee's witness [Tr. 135 to 143], testified that she was secretary of bankrupt corporation; that as such she signed the chattel mortgage together with A. S. Devoll, vice president, in the absence from the city of the other three directors; that she did not have any knowledge that the creditor Leonard Woodruff, defendant and appellant herein, had other security, to-wit, seventy-eight thousand dollars' ($78,000.00) worth of pledged stock to secure his indebtedness; that because he was the heaviest creditor he had persuaded her to execute the chattel mortgage to protect himself; that she wired her brother, Calvin Smith, president of the bankrupt corpora-

tion, for his O. K. without calling a director's meeting and having the execution of the chattel mortgage regularly authorized by a meeting of the board of directors, in accordance with sections 8 and 9 of the corporation's by-laws. (Telegram referred to as O. K. came day after mortgage date, Aug. 4, 1927 [Tr. 242, Deft.'s Ex. A], reading as follows: "It is alright to sign anything Leonard wants. I am looking after his interests. Why the chattel mortgage. Wire me more fully reasons. Await my answer and then sign.) In view of this situation this witness cleared herself in the eyes of the trial court by appearing not to know of the prior security posted to secure the creditor appellant herein against any loss on his claim. This witness testified that as secretary she did not record a seven (7) day notice of intention to execute the chattel mortgage; that no meeting was called or notice ever given to the other directors of the corporation regarding the transaction. She further testified that the creditors who were listed upon the schedules of the bankrupt corporation whose claims were then unpaid when scheduled were in existence at the time of said chattel mortgage. With reference to the nature of bankrupt corporation's business this witness testified as follows:

> "At the time my brother proposed the incorporation, we had a jewelry store at 726-28 South San Pedro street, where we did stone cutting and gem cutting and jewelry repairing; I was clerking as well as gem cutting. The corporation's principal line of business was selling diamonds and jewelry. We also had diamonds on display. I could not give you the amount."

This witness further testified [Tr. 352 to 358] that to the best of her knowledge the creditors whose claims were

scheduled in bankruptcy had claims in existence at the time the chattel mortgage was executed; that she did not receive any money from the defendant Leonard Woodruff the day she signed the mortgage [Tr. 361-362]; which evidence shows that there was no consideration passed at any time for the chattel mortgage; when this witness was asked the question [Tr. 363], "Was there anything said about any other security put up for the eighteen thousand dollars ($18,000.00)?" witness answered, "No, I did not know about that."

Witness John W. Hilton, on behalf of appellee, testified as follows:

That as a director he was not notified to attend any meeting of the board of directors to authorize the issuance of the mortgage; that in accordance with the corporation's by-laws that he never signed any written consent to the calling of the meeting and did not sign any waiver of notice thereof. Section 8 of the by-laws of the Golden State Gem Company, a corporation [Plaintiff's Exhibit 5, Tr. 155-6], reads as follows:

> "When any special meeting of the board of directors is called the notice of such special meeting shall state the time, place and purpose of such meeting, and no business other than as specified in such notice shall be transacted at such special meeting unless all of the directors shall by written assent incorporated in the minutes of such meeting, consent to the transaction thereat of other business."

Section 9 of the by-laws entitled, "Waiver of Notice," reads as follows:

> "When all the directors are present at any directors' meeting, however called or noticed, and sign a

written consent thereto on the records of such meeting, or, if a majority of the directors are present, and if those not present sign in writing a waiver of notice of such meeting, which waiver is presented and made a part of the records of such meeting, the transactions thereof are as valid as if had at a meeting regularly called and noticed as provided by section 320a of the Civil Code of the state of California."

All of the witnesses by their evidence corroborate this witness in that these sections were not complied with, preceding the execution and delivery of the mortgage; this witness further testified that he was in the state of Nevada at the time [Tr. 158]; that in the store of bankrupt corporation there was all classes of jewelry on display, there were some watches and rings, pins and necklaces. Everything from cheap type stones that had a value of twenty-five cents (25¢) apiece up to diamonds worth hundreds of dollars. Half of the place of business was devoted to display of these articles. There were two rooms just about the same size, half was the factory, and the other half the sales room. There were from two to five employed in the sales room, depending upon the season of the year. Around Christmas there were more. With the members of the board, the directors, we did both lapidary and sales work; that at the time this mortgage was executed Mr. Smith, the president of bankrupt corporation, myself and a third director, the president's father, were away. "They were trying to raise funds. The management of the business more or less fell on his sister's shoulders (Mrs. Buck). There were quite a few bills pressing. They didn't know just exactly how to handle them so Mrs. Buck tried to get in touch with Mr. Woodruff and

get some additional money. Mr. Coleman (the attorney for Woodruff) suggested the idea of a mortgage in order to keep these bills from pressing; they could file a chattel mortgage and have a priority over these bills because the loan was already up. There was no consideration for the security had already been put up. This mortgage was to be a chattel mortgage on the business in spite of the collateral, rather the security, that was down at the bank." The witness stated that he so testified in bankruptcy proceedings, in answer to a question, as to the circumstances under which the chattel mortgage was executed; he further stated that he did not know anything about the foreclosure proceedings until the appellant herein, Leonard Woodruff, took possession of all the property after the sale. [Tr. 163, 164.]

Witness Mrs. Nanny Warnekros [Tr. 114, 143, 145 and 150] testified that she was a creditor of bankrupt corporation from the time of its incorporation until the time it was adjudicated bankrupt and her claim was as yet unpaid and was on file against the bankrupt estate covered by a promissory note in the original amount of seven thousand two hundred dollars ($7,200.00). The witness Miss E. A. Murray [Tr. 164] testified on behalf of another creditor of bankrupt corporation, namely, the Vogue Company, that there was a balance as yet unpaid upon an account that was incurred and in existence at the time the chattel mortgage was executed.

Although the witness Calvin Smith, president of the bankrupt corporation, testified [Tr. 167] that he believed he was in Los Angeles on or about the 3rd day of August, 1927, the date the mortgage was executed, later on in his

testimony [Tr. 174] he corrected his evidence to read that he was in the East; that he never received any notice of a special meeting authorizing the execution and delivery of the chattel mortgage; that he never caused to be called such a meeting and did not sign a consent or waiver of notice of such a meeting; that his corporation conducted a wholesale and retail merchandising jewelry business, gem cutting and manufacturing. He testified that the items described in the first paragraph of the chattel mortgage were used in the cutting and manufacturing of gems and jewelry the value thereof was ten thousand dollars ($10,000.00); that the items described in the second paragraph of the chattel mortgage, to-wit: twelve (12) stools and benches, etc., were used to do merchandise work in the wholesale and retail jewelry establishment [Exhibit "A," Tr. 37]; that the rest of the items described were specimens and jewelry merchandise that were kept in the store for the purpose of selling. A lot of these were in the rough and a lot were finished materials, some used for cutting and polishing and most all just for selling. He stated even the rough material was sold in the rough as well as finished to collectors and to private people who wanted the specimens of these stones. The corporation sold these articles cut and uncut to both private people and stores, both finished products and mounted; that the uncut gems and so-called rough merchandise was bought from the different miners of this gem material; that good-sized quantities in the rough were very often sold without any labor thereon; that orders were continually filled for different quantities of materials in the raw every day the year around. This witness further testified that the value

of the articles described at beginning of paragraph III starting, "Two hundred (200) pounds petrified wood" up to and including the articles described and ending with "One hundred (100) Kt. spinel, thirty-five (35) Kt. rubies, three hundred seventy-five (375) Kt. sapphires" [Exhibit "A," Tr. 37], was about fifty thousand dollars ($50,000.00), conservatively estimated. With reference to the purported consideration of the mortgage the witness Calvin Smith, president of the bankrupt corporation, testified that it was true that the Golden State Gem Company owed Mr. Woodruff eighteen thousand dollars ($18,000.00), but the same was owing against pledged goods, namely, seventy-eight thousand dollars' ($78,000.00) worth of semi-precious and precious stones that had been placed on deposit in the name of Leonard Woodruff in a safety deposit box in the Security-First National Bank, Seventh and Spring streets, Los Angeles, California. [Tr. 183.] With reference to the alleged conspiracy between bankrupt corporation and Leonard Woodruff regarding the foreclosure of the chattel mortgage the witness Smith testified that he permitted the proceedings to go by default in consideration of the said Leonard Woodruff promissing to pay all claims then in existence but so long as things would be straightened up with everybody the witness testified that he was the loser by many times more than other people were.

With reference to the allegation about claims being in existence, during the life of the chattel mortgage, and at and about the time of its purported foreclosure, appellant's own testimony being that of his attorney, J. A. Coleman [Tr. 257 to 270, especially 262], shows that in

the state court proceedings herein referred to he was required to do the necessary to either pay for releases or have attachments dismissed by the filing of third party claims in the following entitled cases then pending against bankrupt corporation, in the matter of appearing to protect the interest of appellant, namely: Davidson v. Golden State Gem Co., No. 237532; National Credit Exchange v. Golden State Gem Co., Merchants National Bank v. Golden State Gem Co., the evidence shows that this claim was paid by Leonard Woodruff for the release of this attachment; that the Miller and Kosches Bros. claims were on file against bankrupt estate and unpaid.

In the foreclosure proceedings Attorney J. A. Coleman made application for extraordinary fee [Tr. 262] because as he stated therein that in each of these cases the plaintiffs attached the property mentioned in the mortgage set forth in the plaintiff's complaint; that in each and all of said cases Woodruff was compelled to employ Coleman as attorney to prepare and file his claim as mortgagee to procure a release of the said attachments. The evidence shows that such creditors that questioned the validity of the mortgage at said time threatened to bring suit to have the whole proceeding set aside but that to prevent the same the said Woodruff paid off such threatening creditors.

All in all the evidence of appellant's witnesses referred to, not to say anything about other evidence by other witnesses too voluminous to mention, shows conclusively that there is ample evidence to support the allegation that the said chattel mortgage was made and executed without consideration; that under sections 3440 and 2955, para-

graph 3 of the Civil Code of the state of California, it was fraudulent as to existing creditors and that there was a conspiracy between bankrupt corporation and appellant Woodruff in permitting said foreclosure proceedings to go by default although said conspiracy was innocent in a way in so far as bankrupt corporation was concerned in that bankrupt corporation relied upon Woodruff's representation that he would take care of other claims which he did not do. Accordingly the Special Master, Earl E. Moss, did not err in making his findings of fact that all of the allegations of plaintiff's complaint are true and for the further reason that all of the other defendants defaulted and admitted the said allegations to be true.

In this connection the Honorable Circuit Court's attention is especially called to the fact that at the beginning of these proceedings, besides this specially answering and appealing defendant, there were a number of other defendants who were served with process, namely, Golden State Gem Co. of Nevada, a corporation; J. T. Carrol, agent for Leonard Woodruff, trading as Golden Coast Gem Co.; Walter Calvin Smith, C. E. Buck and A. S. DeVoll, the latter three defendants being directors of bankrupt corporation, Golden State Gem Co. (The director, Hilton, having been unknown, was not joined; and the fifth director, father of the president, had died between date of mortgage and starting of this action.) The fact that all these defendants, excepting this specially answering and specially appealing defendant and his agent, have defaulted is conclusive proof as to the aforesaid defendants that the petition as to them is true. However, inas-

much as all of the property that is the subject matter of the litigation is in the possession of this appealing defendant, Leonard Woodruff, appellant herein, and he is endeavoring by this appeal to attempt to remain in possession thereof, these other defendants are nominal defendants but nevertheless by failing to appear herein in these proceedings and plead anything therein they have admitted the following things:

(a) That there was no consideration for the purported chattel mortgage from the bankrupt corporation to this appealing defendant, Leonard Woodruff, in the sum of eighteen thousand dollars ($18,000.00);

(b) That said chattel mortgage was not regularly authorized by the board of directors of bankrupt corporation at a regularly or specially called meeting for such purpose or at all;

(c) That the merchandise mortgaged consisted of stock in trade of a wholesale and retail merchant and cannot be mortgaged under section 2955, paragraph 3 of the Civil Code of the state of California.

(d) That the said chattel mortgage was fraudulent and void as to fixtures and store equipment, against existing creditors (it has been proved in this case that there were creditors, whose claims were in existence at the time of the execution of said chattel mortgage and are as yet unpaid and are filed as claims against the bankrupt estate) for the reason that seven days previous to the execution and delivery of the said chattel mortgage, no notice of intention to make said transfer was recorded in accordance with section 3440 of the Civil Code of the state of California, the particular section of which that applies here being:

"PROVIDED, also, that the sale, transfer or assignment of a stock in trade, in bulk, or substantial part thereof, otherwise than in the ordinary course of trade and in the regular and usual classes and method of business of the vendor, transferror or assignor, and the sale, transfer, assignment or mortgage of the

fixtures or store equipment of a baker, cafe or restaurant owner, garage owner, machinist or RETAIL OR WHOLESALE MERCHANT, WILL BE CONCLUSIVELY PRESUMED TO BE FRAUDULENT AND VOID as to the then existing creditors of the vendor, transferror, assignor or mortgagor, unless at least seven days before the consummation of such sale, transfer, assignment or mortgage, the vendor, transferror, assignor or mortgagor or the intended vendee, transferee, assignee or mortgagee shall record in the office of the county recorder in the county in which said stock in trade, fixtures or equipment are situated a notice of such intended sale, mortgage, etc."

With reference to appellant's fifth assignment of error, that the Special Master erred in making findings of fact that there was a large quantity of jewelry merchandise pledged to Leonard Woodruff to secure a total amount of thirty-three thousand three hundred forty-five and 44/100 dollars ($33,345.44), including interest to the date of findings, advanced at different times over a period of years by appellant Leonard Woodruff to bankrupt corporation as security for repayment to him of said sum, the evidence of the witness Calvin Smith [Tr. 171-2-3] shows that there was a total of approximately seventy-eight thousand dollars' ($78,000.00) worth of semi-precious stones pledged to secure said indebtedness and that any additional sums above eighteen thousand dollars ($18,000.00) were advanced by Leonard Woodruff at the time the bankrupt corporation was attempting to reorganize into the Golden State Gem Co. of Nevada, at which time of reorganization the said Leonard Woodruff agreed to accept two-thirds of 50% of Smith's interest in the new corporation in consideration of the return of the pledged stock; release of the void mortgage, but inasmuch

as said agreement was not in writing and the stock was not delivered, and the assets of bankrupt corporation did not pass to new corporation, said oral agreement had no legal effect and was unenforceable, inasmuch as the appellant Leonard Woodruff never at any time returned the pledged stock, never presented the note outstanding for payment, or made any effort to effect a fair, adequate, just and equitable accounting with bankrupt corporation other than by the means herein complained of, namely, he never made any effort to foreclose his lien on the pledged merchandise; never made any demand for payment [Tr. 172]; in view of all this, the court could reach no other conclusion than the one he did arrive at referred to in assignment of error V.

So far as the statement is concerned that said finding is erroneous for the reason that it is not within the issues of the case, that statement is ridiculous for the reason that it appears in all the evidence that the appellant Leonard Woodruff was amply secured for the money that he advanced to bankrupt corporation by virtue of the pledged stock and even if he did advance eighteen thousand dollars ($18,000.00) additional, which was not the case, this finding shows that the appellant Leonard Woodruff had already been secured for moneys advanced by having had pledged to him seventy-eight thousand dollars' ($78,000.00) worth of precious and semi-precious jewelry merchandise. The finding is the result of all the evidence adduced at the trial and is necessary to support the proposition that there was no true consideration for the chattel mortgage.

In appellee's original complaint, it is true he sought to have the determination made of the rights of the parties in the pledged property, but the same was withdrawn from the amended complaint for the reason that the same could be disposed of in summary proceedings before the Referee in Bankruptcy, and it should be noted here that the Special Master for trial is the same party as Referee in Bankruptcy and was in position to take judicial notice of a number of things that transpired between the parties to the litigation which are not in evidence and he would be the best judge as to their equitable rights, and it makes no difference whether the Special Master, as such, decreed the equitable rights of the parties in a summary proceeding in bankruptcy, or, in the case at bar, as such finding is the result truly and simply of all the evidence of the subject matter.

With reference to appellant's assignment of error number VI, to-wit: that the Special Master erred in making his conclusion of law I (Appellant's Brief, p. 11), this conclusion of law naturally follows and is the logical sequence; that since it has been estabished that the chattel mortgage was fraudulent and void and the sale resulting from the foreclosure proceedings void all lawful title to the property in question failed to pass and by operation of law at the time of adjudication of the bankrupt corporation, all of the property described in said chattel mortgage, vested in the appellee as trustee for the benefit of creditors of bankrupt estate. There is ample evidence of the ownership of said property prior to the execution and delivery of said chattel mortgage. Most all of the witnesses of

appellee testified that most all of the business was conducted in the building at number 726 South San Pedro street, Los Angeles, California.

The same answer that has been given with reference to the last portion of assignment of error V and all of VI can be applied to cover the points raised by assignment of Error VII, namely, that the Special Master erred in making his conclusions of law No. II, covering order of disposition of pledged stock (App. Brief, p. 11).

However, it is immaterial to appellee whether the court adjudicate as to the pledged stock as a Special Master or a Referee in Bankruptcy. In either event he would adjudicate the same way, based on his findings of fact in this proceeding, so there can be no error.

The same answer made to assignment of error VI can apply in answer to assignment of error VIII, namely, that Special Master erred in making his conclusion of law No. III, ordering an accounting from appellant of mortgaged property.

The reasons set forth on pages 12 to and including part of page 29 (Appellant's Brief), up to assignment of error X, which attempt to indicate that the District Court erred in overruling and denying the exceptions of Leonard Woodruff to findings of fact, conclusions of law and report of Special Master, made special reference to the pages of evidence in the original volumes of the transcript, taken at the trial which is not a part of the record upon appeal herein. Accordingly this Honorable Court is not even in position to inquire into the merits or demerits of any of said purported exceptions, and furthermore the

court in adopting the decision of the Special Master as the decision of the District Court did so, based upon his careful examination and perusal of the entire transcript of evidence, a very great portion of which has been for purposes favorable to the appellant kept out of the appellant's statement of evidence embodied in the transcript [Tr. 113].

In answer to assignment of error X it appears to be meaningless, as there are no errors specified (App. Brief, p. 29).

In answer to assignment of error XI it is covered by the answer given to assignment IV, V and VI.

In answer to assignment of error XII (App. Brief, pp. 29 and 30), inasmuch as the amended complaint states a cause of action, the Special Master, Earl E. Moss, did not err in accepting evidence in support thereof, and in overruling appellant's objections to the introduction of evidence.

The decision of the District Court objected to by assignment of error XIII in which appellant states that the said District Court erred in adopting and confirming the Special Master's report, and each and every finding and etc. (App. Brief, p. 31) naturally follows and is the legal sequel as shown by answers to IV, V and VI.

There is no merit whatsoever to assignment of error XIV, namely, that the court erred in adopting the recommendation of the Special Master and permitting the petitioner to file an amended petition. It is elementary as well as provided by section 473 of the Civil Code of Procedure that in the interest of justice the trial court may at any stage of the proceedings enter an order upon motion therefor granting either party to the action leave to amend pleadings. (473 C. C. P. applies because state court has concurrent jurisdiction with federal court in this kind of an action.)

ARGUMENT.

Appellant takes the position that bankrupt corporation is not a merchant within the purview of sections 2955 and 3440 of the Civil Code of the state of California and accordingly would have the right under the first section to mortgage its personal property and would not be required under the second section to record a seven-day notice of its intention to make said mortgage, pursuant to said section 3440. In addition to this position at the same time by his answer appellant has denied that the provisions of section 3440 of the Civil Code of the state of California were not complied with [see Tr. of Record, p. 71, par. IX].

DENIES the failure to record seven-day notice of intention thereunder;

DENIES the existence of certain creditors at the time of execution and delivery of said chattel mortgage and that their claims are still outstanding although there is no evidence of appellant to support either the position taken or the defense made. In other words, appellant has not only failed to establish by any evidence that bankrupt corporation is not a merchant within the purview of sections 2955 and 3440 of the Civil Code of the state of California, but he has also failed to prove a compliance with section 3440, pursuant to the issue raised by paragraph IX of appellant's answer [Tr. 71].

Appellant also takes the position that inasmuch as the president of bankrupt corporation is the *"alter ego"* of the corporation [Tr. 73, par. 2] it was not necessary to have the execution and delivery of said chattel mortgage regularly authorized at a meeting of the corporation's board of directors pursuant to section 8, of its by-laws

[Tr. 73, par. 2]. However, the evidence in this respect is that the mortgage was executed and delivered to appellant in the absence of three (3) of five (5) of the directors of bankrupt corporation, including that of the president himself, Walter Calvin Smith. The chattel mortgage is signed by A. S. Devoll, vice-president, and Mrs. C. E. Buck, secretary.

The facts stated, constituting the fraud in permitting the foreclosure of the mortgage to go by default is covered by the allegations set forth in paragraph XII of amended complaint [Tr. 60]. These allegations are proved by the evidence of all witnesses. Clearing the transfer, that was void in its inception, through foreclosure proceedings, did not cure the defects, inasmuch as the equitable interests of third parties were concerned. The propositions of law supporting these statements are set forth subsequently under the title in question.

In answer to appellant's statements on pages 40 to and including 50 of his brief, to-wit: that the court erred in overruling appellant's exceptions to the Special Master's report and erred in confirming said report and in entering a decree in favor of the plaintiff is embodied in appellee's propositions of law.

POINTS AND AUTHORITIES AND APPELLEE'S PROPOSITIONS OF LAW.

(1) **Jurisdiction.**

> "Under section 23a of the Bankruptcy Act the federal court has jurisdiction of suits at law or in equity between trustee in bankruptcy and 'adverse claimant,' concerning the property acquired or claimed by the trustee, in the same manner and to the same

extent only as though bankruptcy proceedings had not been instituted."

Section 23b of the Bankruptcy Act requires "consent of the proposed defendants" for such jurisdiction, but excepts suits to recover property or money preferentially or fraudulently transferred. The jurisdiction of a trustee's suit on one of these excepted cases is independent of the proposed defendant's consent, as well as the requirement for the diversity of citizenship, or any of the general grounds to acquire federal jurisdiction.

Cyclopedia of Federal Procedure, Vol. 1, page 574;

Judicial Code Laws of the U. S., paragraph 24 (1), U. S. C. A. 41 (1);

Toledo Fence & Post Co. v. Lyons, 299 Fed. 637;

Operators Piano Co. v. First Wisconsin Trust Co., 283 Fed. 904, 11 U. S. C. A. 96b, 107e;

Bankruptcy Act, paragraphs 60, 67 and 70;

Golden Hill Distilling Co. v. Logue, 243 Fed. 342;

Kraver v. Abrahns, 203 Fed. 782;

Milkman v. Arthe, et al., 213 Fed. 642, 223 Fed. 507;

Harley, et al. v. Devlin, 149 Fed. 268;

Johnston v. Forsyth Mercantile Co., 127 Fed. 845;

Price v. Coolidge Banking Co., et al., 242 Fed. 175;

Hawkins v. Daunenberg Co., et al., 234 Fed. 752;

Winstow v. Stabb, et al., 233 Fed. 304;

Brent, et al. v. Simpson, 233 Fed. 285.

(2) **Sufficiency of Amended Complaint and Proof.**

Amended complaint states facts sufficient to constitute a cause of action against appellant.

(a) Trustee in bankruptcy may maintain an action to set aside a fraudulent conveyance.

Ballau v. Andrews Baking Co., 128 Cal. 562;
Ruggles v. Cannedy, 127 Cal. 290;
Davis v. Winona Wagon Co., 120 Cal. 244.

(b) Section 2955, Civil Code of the state of California:

"Mortgages may be made upon all growing crops, including grapes and fruit, and upon any and all kinds of personal property, except the following:

1. Personal property not capable of manual delivery.

2. Articles of wearing-apparel and personal adornment.

3. The stock in trade of a merchant. 1909–34."

(c) Section 3440, Civil Code of the state of California, which provides that a transfer is fraudulent and void against existing creditors unless at least seven (7) days before the consummation of such sale, or mortgage, the mortgagor records in the office of the county recorder, notice of said intention to mortgage, sell or transfer, stating the time, the name and address of the parties to the instrument and the character of the merchandise or property intended to be sold, transferred or mortgaged.

(d) Section 3007 of the Civil Code of the state of California (with reference to the disposition of pledged stock):

"Whenever property pledged can be sold for a price sufficient to satisfy the claim of the pledgee, the pledgor may require it to be sold, and its proceeds to be applied to such satisfaction, when due."

(e) Section 320a, Civil Code of the state of California, as being the law effecting section 9 of bankrupt corporation by-laws, section 9, follows:

> "When all the directors of a corporation are present at any directors' meeting, however called or noticed, and sign a written consent thereto, on the record of such meeting, or if the majority of the directors are present, and if those not present sign in writing a waiver of notice of such meeting, whether prior to or after the holding of such meeting, which said waiver shall be filed with the secretary of the corporation, the transactions of such meeting are as valid as if had at a meeting regularly called and noticed. 1929."

(f) The court finds a fraudulent intent from the evidence adduced.

Cioli v. Kenouigios, 39 Cal. App. Dec. 376;
Henneway v. Thaxter, 150 Cal. 737.

(g) The complaint shows that appellee represents injured creditors as trustee in bankruptcy arising from the fraudulent transfer.

First National Bank v. Eastman, 144 Cal. 487;
Gray v. Brunnold, 140 Cal. 615;
Horn v. The Volcano Water Co., 13 Cal. 62.

(h) Fraud is generally concealed and hard to prove; if the rational inference from the evidence is the existence of an intent to defraud, it is sufficient.

Rossen v. Villanueva, 175 Cal. 632;
Title Insurance, etc. Co. v. ....., 171 Cal. 173;
Bush & Mallet Co. v. Helfing, 134 Cal. 676.

(i) In a suit by trustee of bankrupt corporation, to recover assets illegally transferred, a decree held proper which required defendant to pay such sum as might be required with the other assets to pay expenses of administration and all just claims, exclusive of claims of stockholders who participated in the illegal transfer.

299 Fed. 106.

(j) Claims of creditors need not be reduced to judgment to entitle the bankrupt's trustee to set aside bankrupt's conveyance as fraud on creditors.

11 Fed. Second 2 N. B. 984.

(3) The Special Master's findings must be taken *prima facie* to be correct.

McNulty v. Wilson, 158 Fed. 221.

Every reasonable presumption is in their favor; and they are not to be set aside or modified, unless there clearly appears to have been error on the Special Master's part.

125 U. S. 149, 31 L. Ed. 664;

Callaghan v. Meyers, 128 U. S. 666, 32 L. Ed. 547;

Crawford v. Neal, 144 U. S. 596, 36 L. Ed. 552;

Doris v. Schwartz, 155 U. S. 636, 39 L. Ed. 289;

Girard Ins. Co. v. Hooper, 162 U. S. 538, 40 L. Ed. 1062.

Equity Rule Number Sixty-five Prescribes the Master's Right to Examine Any Witness in Order That the Evidence May Be Used by the Court If Necessary. This Rule Succeeded Old Equity Rule Number Eighty-one of Federal Equity Procedure of the United States District Court.

With reference to the amendment of appellee's complaint, section 473 of the Code of Civil Procedure of the state of California in part states: "The court may likewise in, its discretion, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars," etc. The record shows [Tr. 48-52-53] that the amendment was allowed on a motion by appellee (notice waived). This section (473 C. C. P.) of the state court applies for the reason that the state court had concurrent jurisdiction with the federal court in this kind of a proceeding.

> "The purpose of a special reference for trial of a case of this nature is to economize the time and labor of the District Court. When counsel makes his exceptions to any decision or finding of the Special Master so confusing, so general, as to require the District Court or Circuit Court of Appeals to practically rehear the matter anew, which on its face is really simple, and thereby nothing is saved by the reference, exceptions under such conditions will be denied under 151 U. S. 285, to and including 291, 38 L. Ed. 164, 166."

> "The exceptions must state article by article those parts of the report which are intended to be excepted to."

Story v. Livingston, 10 L. Ed. 200;

Walker v. Rogers, 6 Johns. 566.

POWERS AND DUTIES OF SPECIAL MASTER.

21 C. J. 601, paragraph 745-2:

"The powers of a Master are usually derived from, and confined to, the terms of the order of reference, and he cannot, by consent of the parties, acquire any authority beyond such order."

Carr v. Fair, 122 S. W. 657;

Lindsey v. Swift, 119 N. E. 787;

Hards v. Burton, 79 Ill. 504;

.....follow from 21 C. J. 601.

"Beside doing acts which are merely ministerial he does perform functions which are of a judicial nature, such as passing upon the competency of evidence, and making findings of law and fact, where a cause is referred to him to take and report the proofs with his conclusions of law and fact, and therefore, it may be properly said that he is an officer performing both judicial and ministerial functions. A Master acts within his province in making such rulings of law as he deems necessary for a full trial of the issues."

Ellwood v. Walter, 103 Ill. A, 219;

Citizens State Bank v. Joplin, 198 S. W. 370;

Snow Iron Works v. Chadwick, 116 N. E. 801.

(4) A void judgment may be avoided by strangers or one claiming to be a *bona fide* creditor or his trustee, when it can be shown that the judgment was obtained by collusion between the plaintiff and defendant.

109 Fed. Rep. 177;

Estate of Pusey, 180 Cal. 358;

Forbes v. Hyde, 31 Cal. 342;

Bennett v. Wilson, 122 Cal. 509;

Kieiss v. Hotaling, 96 Cal. 617;

People v. Green, 74 Cal. 405.

(5) The rule on appeal is that the findings of the trial court cannot be successfully assailed unless they are contrary to the undisputed evidence read in the light of all legitimate inferences.

Atkinson v. Western D. Syndicate, 170 Cal. 503;
Phenegan v. Pavlini, 27 Cal. App. 381;
Benson v. Harriman, 55 Cal. App. 483.

CONCLUSION.

In conclusion appellee submits, after carefully examining all of the points raised in appellant's brief, by way of assignment of errors, no error is found, and it appears from the examination of the entire record, including the pleadings and evidence, although appellant has failed to certify any of the exhibits for examination, that the findings of fact by the Special Master were borne out by the testimony, and that the conclusions of law were justified by such findings; that the order and decree of the District Court adopting the same as the decision of said court was proper and said findings and facts and conclusions of law of the Special Master and the decree of the District Court should therefore be by this court affirmed, without leave to appellant to proceed any further by way of attempting to prosecute an appeal upon any questions herein to the Supreme Court of the United States, as it has been called to the attention of appellee that appellant threatens to do so, for the sole and only purpose of continuing to harass, hinder and delay the creditors represented by appellee herein as trustee in bankruptcy.

Respectfully submitted,

ROBERT L. BEVERIDGE,
Attorney for Appellee.

No. 6416

United States

Circuit Court of Appeals

For the Ninth Circuit.

STANDARD SANITARY MANUFACTURING COMPANY, a Corporation,

Appellant,

vs.

MOMSEN-DUNNEGAN-RYAN COMPANY, a Corporation, PRATT-GILBERT HARDWARE COMPANY, a Corporation, UNION OIL COMPANY OF ARIZONA, a Corporation, PHOENIX PLUMBING AND HEATING COMPANY, a Copartnership Composed of LEO FRANCIS, LYON FRANCIS and D. L. FRANCIS, Copartners, LEO FRANCIS, LYON FRANCIS and D. L. FRANCIS, as Individuals, WILLIAM L. HART, as Trustee in Bankruptcy of the PHOENIX PLUMBING AND HEATING COMPANY, a Copartnership Composed of LEO FRANCIS, LYON FRANCIS and D. L. FRANCIS, Copartners, Bankrupts, and CRANE COMPANY, a Corporation,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Arizona.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 6416

United States

Circuit Court of Appeals

For the Ninth Circuit.

STANDARD SANITARY MANUFACTURING COMPANY, a Corporation,

Appellant,

vs.

MOMSEN-DUNNEGAN-RYAN COMPANY, a Corporation, PRATT-GILBERT HARDWARE COMPANY, a Corporation, UNION OIL COMPANY OF ARIZONA, a Corporation, PHOENIX PLUMBING AND HEATING COMPANY, a Copartnership Composed of LEO FRANCIS, LYON FRANCIS and D. L. FRANCIS, Copartners, LEO FRANCIS, LYON FRANCIS and D. L. FRANCIS, as Individuals, WILLIAM L. HART, as Trustee in Bankruptcy of the PHOENIX PLUMBING AND HEATING COMPANY, a Copartnership Composed of LEO FRANCIS, LYON FRANCIS and D. L. FRANCIS, Copartners, Bankrupts, and CRANE COMPANY, a Corporation,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Arizona.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index.

Index. Page

Index. Page

Index. Page

Index. Page

Index. Page

Index. Page

Index. Page

Index. Page

Index. Page

Index. Page

Index. Page

Index. Page

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

ARMSTRONG, KRAMER, MORRISON & ROCHE, First National Bank of Arizona Bldg., Phoenix, Arizona,
Attorneys for Appellant.

ALICE M. BIRDSALL, Luhrs Tower, Phoenix, Arizona,
Attorney for Appellees.

E. O. PHLEGER, Luhrs Tower, Phoenix, Arizona,
O. E. SCHUPP, Luhrs Building, Phoenix, Arizona,
Attorneys for Alleged Bankrupts.

THOMAS W. NEALON, Luhrs Tower, Phoenix, Arizona,
Attorney for Trustee. [3*]

In the District Court of the United States in and for the District of Arizona.

No. B.-522—PHOENIX.

IN BANKRUPTCY.

MOMSEN-DUNNEGAN-RYAN COMPANY, a Corporation, PRATT-GILBERT HARDWARE COMPANY, a Corporation, and UNION OIL COMPANY OF ARIZONA, a Corporation,
Petitioning Creditors,
vs.

PHOENIX PLUMBING AND HEARING COMPANY, a Co-partnership Composed of LEO

*Page-number appearing at the foot of page of original certified Transcript of Record.

FRANCIS, LYON FRANCIS and D. L. FRANCIS, Co-partners, and D. L. FRANCIS, LEO FRANCIS and LYON FRANCIS, as Individuals,

(Alleged) Bankrupts.

CREDITORS' PETITION.

To the Honorable FRED C. JACOBS, Judge of the District Court of the United States for the District of Arizona:

The petition of Momsen-Dunnegan-Ryan Company, a corporation organized and existing under the laws of the State of Texas and authorized to do business in the State of Arizona, Pratt-Gilbert Hardware Company, a corporation organized and existing under the laws of the State of Arizona, and Union Oil Company of Arizona, a corporation organized and existing under the laws of the State of Arizona, respectfully represents:

That Leo Francis, Lyon Francis and D. L. Francis are partners doing a plumbing, heating, building and contracting business at 316 North Sixth Avenue in the City of Phoenix in said District under the firm name and style of Phoenix Plumbing and Heating Company, and as such have had their principal place of business for the greater portion of the six months next preceding the date of this petition at Phoenix in the County of Maricopa, State and District of Arizona. That if any of the hereinbefore mentioned partners in said business have withdrawn therefrom and the partnership dissolved thereby, the affairs of said partnership have not been finally settled. [4]

That Leo Francis owns an interest in Phoenix Plumbing and Heating Company and participated in each of the acts of bankruptcy hereinafter set up in this petition.

That Lyon Francis owns an interest in Phoenix Plumbing and Heating Company and participated in each of the acts of bankruptcy hereinafter set up in this petition.

That D. L. Francis owns an interest in Phoenix Plumbing and Heating Company and participated in each of the acts of bankruptcy hereinafter set up in this petition.

That Leo Francis, Lyon Francis and D. L. Francis have each had their domicile and residence and principal place of business for the greater portion of the six months next preceding the filing of this bankruptcy petition within the aforesaid District, and none of them is a wage-earner nor are any of them chiefly engaged in farming or tillage of the soil.

That said debtors and each of them owe debts in an amount in excess of One Thousand ($1000.00) Dollars.

That your petitioners are creditors of said partnership and of said Leo Francis, Lyon Francis and D. L. Francis, having provable claims amounting in the aggregate to a sum in excess of Five Hundred ($500.00) Dollars against said debtors and each of them, and that none of your petitioners own any securities whatsoever for the payment of said claims.

That the nature and amount of your petitioners' claims are as follows:

Claim of Momsen-Dunnegan-Ryan Company, a corporation, in the amount of $486.08, being an open account for goods, wares and merchandise sold and delivered to said Phoenix Plumbing and Heating Company and said Leo Francis, Lyon Francis and D. L. Francis, at their special instance and request, between the following dates, to wit, May 1, 1929, and June 4, 1929, on which there still remains due the sum of $486.08. [5]

Claim of Pratt-Gilbert Hardware Company, a corporation, in the amount of $73.31, on open account for goods, wares and merchandise sold and delivered by the said Pratt-Gilbert Hardware Company, a corporation, to the said Phoenix Plumbing and Heating Company and said Leo Francis, Lyon Francis and D. L. Francis, at the special instance and request of said Phoenix Plumbing and Heating Company and said Leo Francis, Lyon Francis and D. L. Francis, between the dates of May 1, 1929, and May 31, 1929, said dates being inclusive, on which there still remains due the sum of $73.31.

Claim of Union Oil Company of Arizona, a corporation, in the amount of $384.55, on open account for goods, wares and merchandise sold and delivered by the said Union Oil Company of Arizona, a corporation, to the said Phoenix Plumbing and Heating Company and said Leo Francis, Lyon Francis and D. L. Francis, at the special instance and request of said Phoenix Plumbing and Heating Company and said Leo Francis, Lyon Francis and D. L. Francis, between the following dates, to wit, August 1, 1928, and August 16, 1929, both dates be-

ing inclusive, on which there still remains due the sum of $384.55.

Your petitioners further represent that the said Leo Francis, Lyon Francis and D. L. Francis, co-partners doing business under the firm name and style of Phoenix Plumbing and Heating Company, and Leo Francis, Lyon Francis and D. L. Francis, are insolvent and have been for a period of more than four months prior to the filing of this petition, and your petitioners further represent that while so insolvent and within four months next preceding the date of this petition, the said Phoenix Plumbing and Heating Company, a co-partnership composed of Leo Francis, Lyon Francis and D. L. Francis, and the said Leo Francis, Lyon Francis and D. L. Francis, as individuals, committed an act of bankruptcy in that they did heretofore, to wit, on the 6th day of June, 1929, transfer, set over and assign to Crane Company, a corporation, all their right, title and interest in and to their book accounts and claims of every nature against the following named persons [6] in the following named amounts, to wit:

$1,000.00 due from E. J. Bennett, Country Club Drive, Phoenix Ariz.,

800.00 due from Harry Tritle, No. Alvarado St., Phoenix,

500.00 due from O. P. Johnson, Verde Lane, Phoenix,

800.00 due from Frank B. Schwentker, Alvarado & Monte Vista, Phoenix,

500.00 due from Marena Teacherage Building, Marena, Arizona,

500.00 due from Dan Campbell, W. Cambridge St., Phoenix,

225.00 due from James Barnes, 1300 Block W. Latham St., Phoenix,

400.00 due from O. R. Bell, 917 North 8th Street, Phoenix,

with intent to prefer said creditor over their other creditors, and they did at a time subsequent to June 1, 1929, transfer to the said Crane Company, a corporation, a portion of their property, to wit, money in the amount of One Thousand ($1,000.00) Dollars, with intent to prefer said creditor over their other creditors.

That the said Phoenix Plumbing and Heating Company, a co-partnership composed of Leo Francis, Lyon Francis and D. L. Francis, and the said Leo Francis, Lyon Francis and D. L. Francis as individuals, did within the four months next preceding the date of this petition, commit an act of bankruptcy in that they did heretofore, to wit, on the 7th day of May, 1929, and while insolvent, transfer a portion of their property, to wit, all moneys due or to become due to them or either or any of them, on a contract for plumbing and heating on the Phoenix Junior College job in Phoenix, Arizona, to the Standard Sanitary Manufacturing Company, a corporation, of 447 East Jefferson Street, Phoenix, Arizona, and did then and there instruct the School Board of the school district in which said Phoenix Junior College is located and the Clerk of said Board to make payments of said moneys to the above-named Standard Sanitary Manufacturing Company as said sums might become due, there be-

ing a sum of money then due or to become due to the said Phoenix Plumbing and Heating Company and said Leo Francis, Lyon Francis and D. L. Francis, under said contract, with intent to prefer said creditor [7] over their other creditors.

That they, the said Phoenix Plumbing and Heating Company and said Leo Francis, Lyon Francis and D. L. Francis, did commit another act of bankruptcy in that they did on, to wit, May 7, 1929, assign to the said Standard Sanitary Manufacturing Company, a corporation, all moneys due or to become due to them or either or any of them, on a contract for plumbing and heating on a certain Library Building located in the city of Phoenix, State of Arizona, there being a large sum of money due or to become due to the said Phoenix Plumbing and Heating Company and said Leo Francis, Lyon Francis and D. L. Francis, upon a contract for the said work, with intent to prefer said creditor over their other creditors.

That the said Phoenix Plumbing and Heating Company, a co-partnership composed of Leo Francis, Lyon Francis and D. L. Francis, co-partners, and the said Leo Francis, Lyon Francis and D. L. Francis as individuals, did within the four months next preceding the date of this petition commit an act of bankruptcy in that they did heretofore, to wit, on the 7th day of May, 1929, and while insolvent, transfer a portion of their property, to wit, all moneys due or to become due to them or either or any of them, on a contract for plumbing on the Central Heating Plant job in Phoenix, Arizona, to the Standard Sanitary Manufacturing Company,

a corporation, of 447 East Jefferson Street, Phoenix, Arizona, there being a large sum of money due or to become due to the said Phoenix Plumbing and Heating Company and said Leo Francis, Lyon Francis and D. L. Francis, upon a contract for the said work, with the intent to prefer said creditor over their other creditors.

That the instrument or instruments by which said properties were assigned and transferred were never recorded or registered, nor did the beneficiaries of any of the hereinbefore described attempted preferences take notorious, exclusive or continuous possession of the property so transferred, except as to the transfer [8] of money hereinbefore set forth as having been paid within four months of the date of the petition, nor did your petitioners receive any actual notice of such transfers or assignments prior to a date four months prior to the filing of this petition.

That they, said Phoenix Plumbing and Heating Company, and said Leo Francis, Lyon Francis and D. L. Francis, did commit a further act of bankruptcy in that they did heretofore at a date subsequent to June 1, 1929, and while insolvent, transfer a portion of their property, to wit, money in the sum of Thirteen Thousand ($13,000.00) Dollars, to a certain creditor, to wit, Standard Sanitary Manufacturing Company, with intent to prefer said creditor over their other creditors.

That they, said Phoenix Plumbing and Heating Company, and said Leo Francis, Lyon Francis and D. L. Francis, did commit a further act of bankruptcy in that they did within four months next

preceding the date of this petition and while insolvent, transfer a portion of their property, to wit, money in the sum of $44.50 to a certain creditor, to wit, Fred Noll Tire Service, with intent to prefer said creditor over their other creditors.

WHEREFORE, your petitioners pray that service of this petition with subpoena may be made upon said Phoenix Plumbing and Heating Company, a co-partnership composed of Leo Francis, Lyon Francis and D. L. Francis, co-partners, and D. L. Francis, Leo Francis and Lyon Francis as individuals, as provided in the Acts of Congress relating to bankruptcy, and that they and each of them may be adjudged by the Court to be bankrupts, both as partners and also as individuals, within the purview of said Acts.

MOMSEN-DUNNEGAN-RYAN COMPANY,
By ALICE M. BIRDSALL,
Its Attorney.

PRATT-GILBERT HARDWARE COMPANY.
By ALICE M. BIRDSALL,
Its Attorney.

UNION OIL COMPANY OF ARIZONA.
By ALICE M. BIRDSALL,
Its Attorney. [9]

ALICE M. BIRDSALL,
Attorney for Petitioners.

United States of America,
District of Arizona,
County of Maricopa,—ss.

Momsen-Dunnegan-Ryan Company, a corporation, Pratt-Gilbert Hardware Company, a Corpora-

tion, and Union Oil Company of Arizona, a corporation, being three petitioners above named, by Alice M. Birdsall, their attorney, do hereby make solemn oath that the statements contained in the foregoing petition subscribed by them are true.

ALICE M. BIRDSALL.

Subscribed and sworn to before me this 17th day of August, 1929.

[Seal] HAZEL K. SAWYER,
Notary Public.

My commission expires April 5, 1933.

Filed Aug. 17, 1929. [10]

[Title of Court and Cause.]

ANSWER OF STANDARD SANITARY MANUFACTURING COMPANY, A CORPORATION.

Comes now the Standard Sanitary Manufacturing Company, a corporation, by its attorneys, Armstrong, Lewis & Kramer, and for answer to that petition filed in the above-entitled cause, praying for the adjudication in bankruptcy of the above-named alleged bankrupts, denies, admits and alleges, as follows:

I.

Admits that the Phoenix Plumbing and Heating Company is a co-partnership composed of Leo Francis, Lynn Francis and D. L. Francis, and that the said co-partnership has a usual place of business in Phoenix, Maricopa County, Arizona, and

that Phoenix, Maricopa County, Arizona, is the domicile of the members of said co-partnership and of the co-partnership as such.

II.

Admits that for a long time past the said Phoenix Plumbing and Heating Company, a co-partnership has been conducting business in the City of Phoenix, Maricopa County, Arizona.

III.

Denies that on or about the 7th day of May, 1929, or at [11] any time mentioned in the foregoing petition, that the Phoenix Plumbing and Heating Company, a co-partnership, was insolvent, and denies that on or about that date the Phoenix Plumbing and Heating Company assigned to or turned over to this creditor any sums of money then due or to become due on that certain job known as the Junior College job, being a certain plumbing and heating contract with the Trustees of the Phoenix Union High School District for the installation of a plumbing and heating plant in said Junior College, and in that respect this creditor alleges that on or about the 7th day of May, 1929, the Phoenix Plumbing and Heating Company, while solvent, did deliver to this creditor a certain paper which purported to assign to this creditor all rights the Phoenix Plumbing and Heating Company, a corporation, had in the said contract with the Trustees of the said District, but that the said Trustees did not accept said assignment, for the reason that the contract for the plumbing and heating job

especially provided that there shoud be no assignment under the said contract for any cause, and that this creditor received no moneys whatsoever from the said contract on May 7th, or at any time since.

That said purported assignment of moneys due on the Junior College job was in the usual form which this creditor demands from all contractors to whom it furnishes material for a contract job, and was given in the usual course of business as a security for material furnished to the said Phoenix Plumbing and Heating Company at a period long prior to the date of the purported assignment; that in truth and in fact this creditor received nothing by the said assignment either on May 7th or on any other date thereafter.

IV.

Answering further this creditor denies that it received [12] from the said Phoenix Plumbing and Heating Company, a co-partnership, an assignment of any sum or sums of money on the so-called library building job, being a contract with the Trustees of the Phoenix Union High School District for the installation of certain plumbing and heating apparatus in the library building of the Phoenix Union High School, but in that regard this creditor alleges that the Phoenix Plumbing and Heating Company, a co-partnership, and the Trustees of the Phoenix Union High School were forbidden by the terms of the said plumbing and heating contract either to make or accept an assignment of any moneys due on the said contract to any person at any time, and that therefore this

creditor received no moneys upon the said library building job by virtue of any alleged assignment.

That on or about the 7th day of May the Phoenix Plumbing and Heating Company, a co-partnership, did deliver to this creditor a writing which purported to assign certain moneys, but that said writing was delivered to this creditor in the usual course of business in the same manner as each and every contractor delivers an assignment as security for material furnished or to be furnished on contracts entered into by such contractors.

That on the 7th day of May, 1929, at the time the said writing was delivered by the Phoenix Plumbing and Heating Company, a co-partnership, it was a going, solvent concern.

V.

Answering further this creditor denies that it received from the said Phoenix Plumbing and Heating Company, a co-partnership, an assignment of any sum or sums of money on the so-called central heating plant job, being a contract with the trustees of the Phoenix Union High School District for the installation [13] of certain plumbing and heating apparatus in the central heating plant of the Phoenix Union High School, but in that regard this creditor alleges that the Phoenix Plumbing and Heating Company, a co-partnership, and the Trustees of the Phoenix Union High School were forbidden by the terms of the said plumbing and heating contract either to make or accept an assignment of any moneys due on the said contract to any person at any time, and that there-

fore this creditor received no moneys upon the said central heating plant job by virtue of any alleged assignment.

That on or about the 7th day of May the Phoenix Plumbing and Heating Company, a co-partnership, did deliver to this creditor a writing which purported to assign certain moneys, but that said writing was delivered to this creditor in the usual course of business in the same manner as each and every contractor delivers an assignment as security for material furnished or to be furnished on contracts entered into by such contractors.

That on the 7th day of May, 1929, at the time the said writing was delivered by the Phoenix Plumbing and Heating Company, a co-partnership, it was a going, solvent concern.

VI.

Answering further this creditor denies that on or about the 5th day of June it received the sum of Thirteen Thousand ($13,000) Dollars from the alleged bankrupts, as set forth in said petition, and in that regard this creditor alleges that on or about the 5th day of March, 1929, the Phoenix Plumbing and Heating Company, a co-partnership, delivered to this creditor an order upon the Lincoln Mortgage Company for the sum of Thirteen Thousand ($13,000) Dollars, which said sum was then due or about to become due to the credit of the Phoenix [14] Plumbing and Heating Company; that at that time and place the said Thirteen Thousand ($13,000) Dollars became and was the property of this creditor, and that

on or about the 5th day of June, 1929, the said Lincoln Mortgage Company, by virtue of said order dated on or about March 5, 1929, delivered to this creditor the sum of Thirteen Thousand ($13,000) Dollars, but this creditor alleges that the Phoenix Plumbing and Heating Company had no authority or interest in said money at any date after the 5th day of March, 1929.

That at the time said order was delivered to this creditor on the 5th day of March, 1929, and at all times since, the said Phoenix Plumbing and Heating Company was a solvent, going concern, with assets greatly in excess of its liabilities.

VII.

Answering further this creditor alleges upon information and belief, and therefore states as a fact, that at the time the alleged assignments were made to the Crane Company and to the Noll Tire and Service Company, as set forth in the creditor's petition filed herein, the Phoenix Plumbing and Heating Company was a solvent, going concern, and that said assignments were nothing more nor less than payment to the Crane Company and the Noll Tire and Service Company for bills of goods sold to the Phoenix Plumbing and Heating Company prior to the date of the said alleged assignments.

VIII.

Answering further, this creditor states that at all times mentioned herein prior to the 7th day of May, 1929, the Phoenix Plumbing and Heating Company had received from this creditor mate-

rials designed for each of the various jobs set forth herein, which materials had been incorporated in said jobs, and for which said materials the Phoenix Plumbing and Heating Company [15] owed this creditor various sums of money.

IX.

Answering further, this creditor shows that at no time prior to the date of the filing of said petition did the Phoenix Plumbing and Heating Company make an assignment to this creditor with the intention or for the purpose of hindering, delaying or defrauding any of the creditors of the Phoenix Plumbing and Heating Company, and that at all times mentioned herein the assets of the Phoenix Plumbing and Heating Company were in excess of all of the indebtedness of the Phoenix Plumbing and Heating Company, a co-partnership.

WHEREFORE, this creditor having fully answered said creditor's petition, prays that the said petition be dismissed as against the Phoenix Plumbing and Heating Company, a co-partnership.

By Its Attorneys,
ARMSTRONG, LEWIS & KRAMER,
Attorneys for Standard Sanitary Manufacturing Company, a Corporation.

United States of America,
District of Arizona,—ss.

Standard Sanitary Manufacturing Company, a corporation, being the creditor above named, by Frank J. Duffy, one of *these* attorneys, do hereby make solemn oath that the statements made in the

foregoing answer are true, except as to matters stated upon information and belief, and as to those he believes them to be true.

FRANK J. DUFFY.

Subscribed to and sworn before me on this 5th day of September, A. D. 1929.

[Seal] THOS. O. BISHOP,
Deputy Clerk, U. S. Dist. Court, District of Arizona. [16]

Received copy of the within document this 5th day of September, 1929.

ALICE M. BIRDSALL,
By H. S.,
Attorney for Petitioning Creditors.

Filed Sept. 5, 1929. [17]

[Title of Court and Cause.]

ORDER OF REFERENCE TO SPECIAL MASTER.

It appearing that Momsen-Dunnegan-Ryan Company, a corporation, Pratt-Gilbert Hardware Company, a corporation, and Union Oil Company of Arizona, a corporation, as petitioning creditors, have filed an involuntary petition herein, praying for the adjudication of the Phoenix Plumbing and Heating Company, a co-partnership, composed of Leo Francis, Lyon Francis and D. L. Francis, co-partners; and D. L. Francis, Leo Francis and Lyon Francis, as individuals, as bankrupts, and that D. L. Francis and Lyon Francis, alleged bankrupts, and

the Standard Sanitary Manufacturing Company, a corporation; a creditor of the alleged bankrupts, and Crane Company, a corporation, a creditor of the alleged bankrupts, have appeared and filed separate answers to said petition; and that Leo Francis, one of the alleged bankrupts, for himself and the Phoenix Plumbing and Heating Company, has filed an admission of willingness to be adjudged a bankrupt,—

NOW, on the motion of Alice M. Birdsall, attorney for said petitioning creditors,—

IT IS ORDERED, that the issues made by said petition and said respective answers be, and they hereby are, referred [18] to R. W. Smith, Esq., as Special Master under rule of court to ascertain and report the facts with his conclusions thereon.

Dated this 4th day of November, 1929.

F. C. JACOBS,
District Judge.

Filed Nov. 4, 1929. [19]

[Title of Court and Cause.]

REPORT OF SPECIAL MASTER ON PETITION FOR INVOLUNTARY ADJUDICATION.

I, the undersigned, Referee in Bankruptcy, to whom as Special Master, under rule of court, was referred the petition of Momsen-Dunnegan-Ryan Company, a corporation, Pratt-Gilbert Hardware Company, a corporation, and Union Oil Company

of Arizona, a corporation, praying for the adjudication of Phoenix Plumbing and Heating Company, a co-partnership composed of Leo Francis, Lyon Francis, and D. L. Francis, co-partners, and Leo Francis, Lyon Francis, and D. L. Francis, as individuals, as bankrupts, and the separate answers of D. L. Francis and Lyon Francis, alleged bankrupts, and the Standard Sanitary Manufacturing Company, a corporation, a creditor of the alleged bankrupts and Crane Company, a corporation, a creditor of the alleged bankrupts, and the admission of willingness to be adjudicated bankrupt of Leo Francis for himself and the Phoenix Plumbing and Heating Company, to ascertain and report the facts with my conclusions thereon, do hereby report as follows: [20]

Upon due notice, the parties herein appeared before me with their witnesses and other evidence, said petitioning creditors appearing by Alice M. Birdsall; said alleged bankrupts D. L. Francis and Lyon Francis by E. O. Phlegar, Esq.; said admitted bankrupt Leo Francis by O. E. Schupp, Esq.; said Standard Sanitary Manufacturing Company, a corporation, by Frank J. Duffy, Esq., of the firm of Armstrong, Lewis and Kramer; and said Crane Company, a corporation, by Earl F. Drake, whereupon due hearing was had and arguments of counsel heard, upon due consideration whereof I do find the facts to be as follows:

1. That Momsen-Dunnegan-Ryan Company is a corporation, duly organized and existing under the

the Standard Sanitary Manufacturing Company, a corporation; a creditor of the alleged bankrupts, and Crane Company, a corporation, a creditor of the alleged bankrupts, have appeared and filed separate answers to said petition; and that Leo Francis, one of the alleged bankrupts, for himself and the Phoenix Plumbing and Heating Company, has filed an admission of willingness to be adjudged a bankrupt,—

NOW, on the motion of Alice M. Birdsall, attorney for said petitioning creditors,—

IT IS ORDERED, that the issues made by said petition and said respective answers be, and they hereby are, referred [18] to R. W. Smith, Esq., as Special Master under rule of court to ascertain and report the facts with his conclusions thereon.

Dated this 4th day of November, 1929.

F. C. JACOBS,
District Judge.

Filed Nov. 4, 1929. [19]

[Title of Court and Cause.]

REPORT OF SPECIAL MASTER ON PETITION FOR INVOLUNTARY ADJUDICATION.

I, the undersigned, Referee in Bankruptcy, to whom as Special Master, under rule of court, was referred the petition of Momsen-Dunnegan-Ryan Company, a corporation, Pratt-Gilbert Hardware Company, a corporation, and Union Oil Company

of Arizona, a corporation, praying for the adjudication of Phoenix Plumbing and Heating Company, a co-partnership composed of Leo Francis, Lyon Francis, and D. L. Francis, co-partners, and Leo Francis, Lyon Francis, and D. L. Francis, as individuals, as bankrupts, and the separate answers of D. L. Francis and Lyon Francis, alleged bankrupts, and the Standard Sanitary Manufacturing Company, a corporation, a creditor of the alleged bankrupts and Crane Company, a corporation, a creditor of the alleged bankrupts, and the admission of willingness to be adjudicated bankrupt of Leo Francis for himself and the Phoenix Plumbing and Heating Company, to ascertain and report the facts with my conclusions thereon, do hereby report as follows: [20]

Upon due notice, the parties herein appeared before me with their witnesses and other evidence, said petitioning creditors appearing by Alice M. Birdsall; said alleged bankrupts D. L. Francis and Lyon Francis by E. O. Phlegar, Esq.; said admitted bankrupt Leo Francis by O. E. Schupp, Esq.; said Standard Sanitary Manufacturing Company, a corporation, by Frank J. Duffy, Esq., of the firm of Armstrong, Lewis and Kramer; and said Crane Company, a corporation, by Earl F. Drake, whereupon due hearing was had and arguments of counsel heard, upon due consideration whereof I do find the facts to be as follows:

1. That Momsen-Dunnegan-Ryan Company is a corporation, duly organized and existing under the

laws of the State of Texas and authorized to do business in the State of Arizona.

2. That Pratt-Gilbert Hardware Company is a corporation, duly organized and existing under the laws of the State of Arizona.

3. That the Union Oil Company of Arizona is a corporation, duly organized and existing under the laws of the State of Arizona.

4. That Leo Francis, Lyon Francis, and D. L. Francis are and were at all times mentioned in the petition herein, co-partners, doing business under the firm name and style of Phoenix Plumbing and Heating Company and as such have had their principal place of business at 316 North Six Avenue in the city of Phoenix, County of Maricopa, State and District of Arizona for more than six months next preceding the date of filing the petition herein, and that the affairs of said partnership have not been finally settled, and that said co-partnership and said individuals above named and each of them owe debts in the amount of $1,000.00 and more, and that they are not and neither of them is a wage earner nor chiefly engaged in farming or the tillage of the soil. [21]

5. That said Phoenix Plumbing and Heating Company, a co-partnership, composed of Leo Francis, Lyon Francis and D. L. Francis was at the date of filing of the petition herein, now is, and has been for more than four months next preceding the date of filing of the petition herein, insolvent.

6. That said Leo Francis, Lyon Francis and D. L. Francis and each of them now are, were at

the time the petition herein was filed, and have been for more than four months next preceding the date of filing of the petition herein, insolvent.

7. That the petitioners herein are creditors of said alleged bankrupts and have provable claims which amount in the the aggregate to a sum in excess of Five Hundred ($500.00) Dollars and that neither of said petitioners holds any securities whatsoever for the payment of their said claims.

8. That the nature and amount of said petitioners' claims are as follows:

(a) Claim of Momsen-Dunnegan-Ryan Company, a corporation, in the amount of $486.08, being an open account for goods, wares and merchandise sold and delivered to said Phoenix Plumbing and Heating Company, a co-partnership, and said Leo Francis, Lyon Francis and D. L. Francis at their special instance and request between the dates of May 1st, 1929, and June 4th, 1929, on which there remains due the sum of $486.08.

(b) Claim of Pratt-Gilbert Hardware Company, a corporation, in the amount of $73.31 on open account for goods, wares and merchandise sold and delivered by said corporation creditor to the alleged bankrupts at their special instance and request between the dates of May 1st, 1929, and May 31st, 1929, both dates inclusive, on which there still remains due the sum of $73.31. [22]

(c) Claim of Union Oil Company of Arizona, a corporation, in the amount of $384.55 on open account for goods, wares and merchandise sold and delivered by said corporation creditor to said al-

leged bankrupts at their special instance and request between the dates of August 1st, 1928, and August 16th, 1929, both dates inclusive, on which there still remains due the sum of $384.55.

9. That Leo Francis owns an interest in the Phoenix Plumbing and Heating Company and participated in each of the acts of bankruptcy hereinafter mentioned.

10. That Lyon Francis owns an interest in the Phoenix Plumbing and Heating Company and participated in each of the acts of bankruptcy hereinafter mentioned.

11. That D. L. Francis owns an interest in the Phoenix Plumbing and Heating Company and participated in each of the acts of bankruptcy hereinafter mentioned.

12. That a certificate of co-partnership was executed by Dee L. Francis, Leo Francis and Lyon Francis on the 27th day of December, 1928, which certificate was acknowledged before a Notary Public and filed in the office of the County Recorder of Maricopa County, State of Arizona, on December 28th, 1928, in Book 2 of partnership records at page 144 thereof.

13. That Crane Company, a corporation, and Standard Sanitary Manufacturing Company, a corporation, are and were at all times mentioned in the petition herein creditors of the Phoenix Plumbing and Heating Company, Leo Francis, Lyon Francis and D. L. Francis and each of them.

14. That on the 6th day of June, 1929, and within four months next preceding the date of the

petition herein, the said alleged bankrupts Phoenix Plumbing and Heating Company, a co-partnership, and Leo Francis, Lyon Francis and D. L. Francis, and each of them [23] did, while insolvent, assign, transfer and set over to Crane Company, a corporation, all their right, title and interest in and to their book accounts and claims of every nature against the following named persons in the following named amounts, to wit:

$1,000.00 due from E. J. Bennett, Country Club Drive, Phoenix, Arizona,

$ 800.00 due from Harry Trittle, North Alvarado Street, Phoenix, Arizona,

$ 500.00 due from O. P. Johnson, Verde Lane, Phoenix, Arizona,

$ 800.00 due from Frank B. Schwentker, Alvarado and Monte Vista, Phoenix, Arizona,

$ 500.00 due from Marana Teacherage Building, Marana, Arizona,

$ 500.00 due from Dan Campbell, West Cambridge Street, Phoenix, Arizona,

$ 225.00 due from James Barnes, 1300 Block West Latham Street, Phoenix, Arizona,

$ 400.00 due from O. R. Bell, 917 North Eighth Street, Phoenix, Arizona,

and aggregating the sum of $4,725.00, with intent to prefer said creditors over their other creditors.

15. That within four months next preceding the date of the petition herein, to wit: on July 6th, 1929, the said alleged bankrupts above mentioned and each of them did, while insolvent, transfer to said Crane Company, a corporation, a por-

tion of their property, to wit: Money in the sum of $804.72, with intent to prefer said creditor over their other creditors.

16. That on or about June 10th, 1929, and within four months next preceding the filing of the petition herein, the said alleged bankrupts, Phoenix Plumbing and Heating Company, a co-partnership, and Leo Francis, Lyon Francis and D. L. Francis, did while insolvent, transfer and pay over to Standard Sanitary Manufacturing [24] Company, a corporation, a creditor, a portion of their property, to wit: Money in the sum of Thirteen Thousand ($13,000.00) Dollars, with intent to prefer said creditor over their other creditors.

17. That Leo Francis, one of the alleged bankrupts above named filed herein on the 18th day of September, 1929, his admission of willingness to be adjudicated bankrupt accompanied by a schedule of his liabilities and assets.

And my Conclusions of Law are:

1. That this court has jurisdiction to adjudge the said Phoenix Plumbing and Heating Company, a co-partnership composed of Leo Francis, Lyon Francis and D. L. Francis, and Leo Francis, Lyon Francis and D. L. Francis, as individuals, bankrupt.

2. That the Phoenix Plumbing and Heating Company, a co-partnership composed of Leo Francis, Lyon Francis and D. L. Francis, and Leo Francis, Lyon Francis and D. L. Francis as individuals did on the 6th day of June, 1929, and within four months next preceding the date of fil-

ing the involuntary petition herein, commit an act of bankruptcy by assigning, transferring and setting over, while insolvent, to Crane Company, a corporation, all their right, title and interest in and to their book accounts and claims of every nature against the various persons named in the amounts set out in paragraph 14 of the findings of fact hereinbefore set out, aggregating the sum of Four Thousand Seven Hundred and Twenty-five ($4,725.00) Dollars.

3. That the said alleged bankrupts and each of them did on the 6th day of July, 1929, and within four months next preceding the date of the filing of the involuntary petition herein, commit a further act of bankruptcy by transferring, while insolvent, to said Crane Company, a corporation, the sum of Eight Hundred [25] Four and Seventy-two One Hundredths ($804.72) Dollars in money.

4. That the said alleged bankrupts and each of them did, on or about June 10th, 1929, and within four months next preceding the date of filing of the involuntary petition herein, commit a further act of bankruptcy by transferring and paying over, while insolvent, to Standard Sanitary Manufacturing Company, a corporation, the sum of Thirteen Thousand ($13,000.00) Dollars in money.

5. That the said Phoenix Plumbing and Heating Company, a co-partnership composed of Leo Francis, Lyon Francis and D. L. Francis, co-partners, and Leo Francis, Lyon Francis and D. L. Francis as individuals are bankrupts within the

true intent and meaning of the Acts of Congress relating to bankruptcy.

Accordingly, I recommend that the said Phoenix Plumbing and Heating Company, a co-partnership composed of Leo Francis, Lyon Francis and D. L. Francis, co-partners, and Leo Francis, Lyon Francis and D. L. Francis as individuals and each of them be adjudicated bankrupt as of the date of the filing of the involuntary petition herein, to wit: The 17th day of August, 1929.

Dated this 18th day of February, 1930.

R. W. SMITH,
Special Master.

Papers and documents constituting the record are transmitted herewith as follows, viz.:

1. Creditors' petition.
2. Answer of alleged bankrupts. [26]
3. Appearance of Standard Sanitary Manufacturing Company.
4. Amended answer of alleged bankrupts.
5. Answer of Standard Sanitary Manufacturing Company.
6. Answer of Crane Company.
7. Admission of willingness to be adjudged bankrupt by Leo Francis.
8. Second amended answer of alleged bankrupts.
9. Motion of petitioning creditors to strike the answer of Standard Sanitary Manufacturing Company.
10. Motion of petitioning creditors to strike the answer of Crane Company.

11. Withdrawal of Richeson and Gehres as counsel for alleged bankrupts.
12. Amended answer of Standard Sanitary Manufacturing Company.
13. Stipulation permitting Crane Company to file amended answer.
14. Order permitting Crane Company to file amended answer.
15. Amended answer of Crane Company.
16. Order of reference.
17. Copy of schedules filed by Leo Francis.
18. Brief of petitioning creditors.
19. Memorandum of authorities of Standard Sanitary Manufacturing Company.
20. Reply brief of petitioning creditors.
21. Memorandum of authorities on costs by petitioning creditors.
22. Cost bill filed by petitioning creditors.
23. All exhibits filed.
24. Reporter's transcript of testimony taken—3 volumes.

Filed Feb. 18, 1930. [27]

[Title of Court and Cause.]

EXCEPTIONS OF STANDARD SANITARY MANUFACTURING COMPANY TO THE REPORT OF THE SPECIAL MASTER.

Comes now the Standard Sanitary Manufacturing Company, a corporation, a creditor of the Phoenix

Plumbing and Heating Company, alleged bankrupt herein, and makes exception to the Master's Report filed in the above-entitled cause on the 18th day of February, 1930, and more particularly excepts to the findings of fact contained in subdivision 16 of the Findings of Fact made by said Master in said report, which said finding of fact is as follows:

> "16. That on or about June 10th, 1929, and within four months next preceding the filing of the petition herein, the said alleged bankrupts, Phoenix Plumbing and Heating Company, a co-partnership, and Leo Francis, Lyon Francis and D. L. Francis, did while insolvent, transfer and pay over to Standard Sanitary Manufacturing Company, a corporation, a creditor, a portion of their property, to wit: Money in the sum of Thirteen Thousand ($13,000.00) Dollars with intent to prefer said creditor over their other creditors."

for the following reasons:

(1) That said finding of fact has no foundation in the evidence submitted, because it appears affirmatively in the report of the evidence and by Respondent's Exhibit "C" in evidence that Phoenix Plumbing and Heating Company did on the 5th day of March, 1929, assign and set over to the Standard Sanitary Manufacturing Company all its right, title and interest to the money owed the Phoenix Plumbing and Heating Company by the Lincoln Mortgage Company on a certain contract which the

Phoenix Plumbing and Heating Company then had with [28] the Lincoln Mortgage Company, and that said assignment contained an order to the Lincoln Mortgage Company to pay to the Standard Sanitary Manufacturing Company all of the moneys owing or to become due from the Lincoln Mortgage Company to the Standard Sanitary Manufacturing Company.

(See Respondent's Exhibit "C" and page 329, Vol. 2, Transcript of Evidence.)

(2) For the further reason that on the 5th day of March, 1929, the said Lincoln Mortgage Company accepted said assignment and order and was thereby bound to pay the money to the Standard Sanitary Manufacturing Company.

(3) For the further reason that it appears affirmatively by the evidence that the check which was paid by the Lincoln Mortgage Company for $14,000.00 on or about the 6th day of June, 1929, was taken to the bank by representatives of the Standard Sanitary Manufacturing Company and representatives of the Phoenix Plumbing and Heating Company, and was there cashed and the $13,000.00 paid to the Standard Sanitary Manufacturing Company, that being the first date upon which the said money held by the Lincoln Mortgage Company was released by reason of the completion of the work.

(Reporter's Transcript, Vol. 3, pages 391, 392.)

(4) Because it affirmatively appeared in the evidence by the testimony of Leo Francis, the owner of the Phoenix Plumbing and Heating Company,

that said transaction transferring all the right, title and interest of the Phoenix Plumbing and Heating Company to the money held by the Lincoln Mortgage Company took place on the 5th day of March, 1929, and that said assignment and order was accepted by the Lincoln Mortgage Company on the 5th day of March, 1929; and

It further appears from all of the evidence that the [29] Phoenix Plumbing and Heating Company was petitioned into bankruptcy on the 17th day of August, 1929, and that the said transaction by which all the right, title and interest of the Phoenix Plumbing and Heating Company in the Lincoln Mortgage Company money was transferred to the Standard Sanitary Manufacturing Company was in truth and in fact more than four months prior to the date of the filing of the petition in involuntary bankruptcy.

(5) Because it affirmatively appears upon all the evidence in the case, and upon the Master's Report, Findings of Fact and Conclusions of Law, that the Phoenix Plumbing and Heating Company was a solvent, going concern during the month of March, 1929.

Comes now the Standard Sanitary Manufacturing Company, a corporation, a creditor of the Phoenix Plumbing and Heating Company, alleged bankrupt herein, and excepts to the Conclusions of Law filed in the said Master's Report herein, and more particularly to the conclusion of law contained in subdivision 4 of the Conclusions of Law, which said conclusion is in the words and figures as follows:

"4. That the said alleged bankrupts and each of them did, on or about June 10th, 1929, and within four months next preceding the date of filing of the involuntary petition herein, commit a further act of bankruptcy by transferring and paying over, while insolvent, to Standard Sanitary Manufacturing Company, a corporation, the sum of Thirteen Thousand ($13,000.00) Dollars in money."

for the following reasons:

(1) That it affirmatively appears by the evidence in the case that the said $13,000.00 was assigned to the Standard Sanitary Manufacturing Company by the Phoenix Plumbing and Heating Company and the Lincoln Mortgage accepted such assignment on the 5th day of March, 1929, and that thereafter [30] the Phoenix Plumbing and Heating Company had no control, interest or right in the said $13,000.00 and that the same was not transferred and paid over by the Phoenix Plumbing and Heating Company while insolvent on or about the 10th day of June, 1929.

(2) Because it affirmatively appears by the testimony of D. L. Francis (Reporter's Transcript, Vol. 2, page 329) and by the evidence of Fryberger (Reporter's Transcript, Vol. 3, pages 391, 392) and by Respondent's Exhibit "C" in evidence, that full and complete title to the said $13,000.00 passed to the Standard Sanitary Manufacturing Company on the 5th day of March, 1929, and that there does not appear in the evidence, findings of fact or conclu-

sions of law any proof that the Phoenix Plumbing and Heating Company was not a solvent, going concern on the 5th day of March, 1929.

Comes now the Standard Sanitary Manufacturing Company, and excepts to the report of the Master filed in the above-entitled cause, and particularly to that portion of the said report which is contained in subdivision 5 of the Findings of Fact, which is in words and figures as follows:

> "5. That said Phoenix Plumbing and Heating Company, a co-partnership, composed of Leo Francis, Lyon Francis and D. L. Francis was at the date of filing of the petition herein, now is, and has been for more than four months next preceding the date of filing of the petition herein, insolvent."

for the reason:

(1) That nowhere in the evidence upon which the said Master's Report, Findings of Fact and Conclusions of Law are based does there appear any proof of insolvency prior to the 20th day of July, 1929, but that in truth and in fact the evidence contained in the Reporter's Transcript shows conclusively [31] that at all times up to and including the 22d day of June, 1929, the Phoenix Plumbing and Heating Company was a solvent, going concern and was so treated by all of its creditors, including the petitioning creditors herein, and that upon all the evidence the finding of insolvency should have been the 20th day of July, 1929.

WHEREFORE, your petitioner, Standard Sanitary Manufacturing Company, respectfully prays that the report, Findings of Fact and Conclusions of Law filed by the Master in the above-entitled cause be corrected so as to strike therefrom subdivisions 5 and 16 of the Findings of Fact and subdivision 4 of the Conclusions of Law of the said Master's report.

ARMSTRONG, LEWIS & KRAMER,
Attorneys for Standard Sanitary Manufacturing Company, a Corporation.

Received copy of the within document this 6th day of March, 1930.

FRED BLAIR TOWNSEND and
EARL F. DRAKE,
Attorneys for Crane Co.
E. O. PHELGAR,
Attorney for D. L. & Lyon Francis.
ALICE M. BIRDSALL,
Attorney for ————.
Per S. O'BRIEN.
R. W. SMITH,
Special Master.

Filed Mar. 6, 1930. [32]

In the District Court of the United States in and for the District of Arizona.

No. B.-522—PHOENIX.

MOMSEN-DUNNEGAN-RYAN COMPANY, a Corporation, PRATT-GILBERT HARDWARE COMPANY, a Corporation, and UNION OIL COMPANY OF ARIZONA, a Corporation,

Petitioning Creditors,

vs.

PHOENIX PLUMBING AND HEATING COMPANY, a Co-partnership Composed of LEO FRANCIS, LYON FRANCIS, and D. L. FRANCIS, Co-partners, and D. L. FRANCIS, LEO FRANCIS and LYON FRANCIS, as Individuals,

(Alleged) Bankrupts.

DECREE.

This cause having come on to be heard on the exceptions of D. L. Francis and Lyon Francis, alleged bankrupts, and of the Standard Sanitary Manufacturing Company, a creditor, to the report of the Special Master, on petition for involuntary adjudication, filed herein on the 18th day of February, 1930, and the same having been argued by counsel on the 21st day of May, 1930, and submitted, and by the court taken under advisement, and the court having duly considered the same and being fully advised in the premises,—

IT IS ORDERED, ADJUDGED AND DECREED, that said objections to said report of said Special Master, be overruled, [33] and that said report of said Special Master be approved and confirmed, and that costs of said Special Master taxed at $992.75, be awarded against the Standard Sanitary Manufacturing Company, in favor of petitioning creditors, herein.

IT IS FURTHER ORDERED that petitioning creditors recover costs taxed at the sum of $———, as costs of said alleged bankrupts, D. L. Francis and Lyon Francis, to be paid out of said bankrupt estate.

IT IS FURTHER ORDERED that the Phoenix Plumbing and Heating Company, a co-partnership composed of Leo Francis, Lyon Francis and D. L. Francis, co-partners, and D. L. Francis, Leo Francis, and Lyon Francis as individuals, be and they hereby are declared and adjudged bankrupts.

AND IT IS ORDERED that said matter be referred to Hon. R. W. Smith, one of the Referees in Bankruptcy of this Court to take such further proceedings therein as are required by the Acts of Congress relating to bankruptcy, and that the said bankrupts shall attend before said Referee on the 23d day of June, 1930, at Phoenix, and thenceforth shall submit to such orders as may be made by said Referee or by this Court relating to said bankruptcy.

Dated this 10th day of June, 1930.

F. C. JACOBS,
District Judge.

As provided in Rule 34, approved as to form this 2d day of June, 1930.

ARMSTRONG, LEWIS & KRAMER,
Attorneys for Standard Sanitary Mfg. Co.

As provided in Rule 34, approved as to form this 2 day of June, 1930.

E. O. PHLEGAR,
Attorney for D. L. and Lyon Francis.

Filed Jun. 10, 1930. [34]

[Title of Court and Cause.]

MEMORANDUM OF COSTS AND DISBURSEMENTS OF PETITIONING CREDITORS ON HEARING BEFORE SPECIAL MASTER.

DISBURSEMENTS.

Marshal's Fees		$ 6.75
Clerk's Fees		
Reporter's Fees, 12 days, at $10.00, $120.00; Transcript, $372.20		492.20
Exceptions overruled, (3) Standard San. Mfg. Co.		15.00
Exceptions overruled, D. L. & Lyon Francis (13)		65.00
Examiner's Fees		700.00
Witness Fees: (All on Insolvency)		
H. E. Green	$2.00	
Chas. J. Asche	2.00	
C. B. Lane	2.00	

Frank McNichol	2.00	
Cliff Fryberger	2.00	
Lee Fretz	2.00	
Jerrie Lee (5 days)	10.00	
H. Fliedner	2.00	
Dorothy Dorrel	2.00	
		26.00
Southwest Audit Company examination books and records, and report on assets and liabilities of bankrupt	200.00	
Total		$1504.95

United States of America,
District of Arizona,—ss.

Alice M. Birdsall, being duly sworn, deposes and says: That she is the attorney for petitioning creditors in the above-entitled cause, and as such has knowledge of the facts relative to the above costs and disbursements. That the items in the above memorandum contained are correct; that the said disbursements have been necessarily [35] incurred in the said cause, and that the services charged therein have been actually and necessarily performed as therein stated.

ALICE M. BIRDSALL.

Subscribed and sworn to before me this 2d day of June, A. D. 1930.

My commission expires Jan. 6, 1934.

SARA L. O'BRIEN,
Notary Public.

To Messrs. Armstrong, Lewis & Kramer, Attorneys for Standard Sanitary Manufacturing Company, and E. O. Phlegar, Attorney for D. L. and Lyon Francis.

You will please take notice that on Thursday, the 5th day of June, A. D. 1930, at the hour of 9:30 o'clock, A. M., I will apply to the Clerk of said court to have the within memorandum of costs and disbursements taxed pursuant to the rule of said court, in such case made and provided.

ALICE M. BIRDSALL,
Attorney of Petitioning Creditors.

Service of within memorandum of costs and disbursements, and receipt of a copy thereof acknowledged, this 2d day of June, A. D. 1930.

ARMSTRONG, LEWIS & KRAMER,
Attorneys for Standard Sanitary Manufacturing Co., Objecting Creditor.

Service of within memorandum of costs and disbursements, and receipt of a copy thereof acknowledged, this 2 day of June, A. D. 1930.

E. O. PHLEGAR,
Attorney for D. L. and Lyon Francis.

Petitioning creditors' costs in hearing on opposition to adjudication in bankruptcy before Special Master in the sum of $992.75 taxed and entered against Standard Sanitary Mfg. Co., this 11th day of June, 1930.

C. R. McFALL,
Clerk.
By J. LEE BAKER,
Chief Deputy.

Petitioning creditors' costs retaxed by order of court June 23, 1930, and entered as follows:

Crane Co.	260.75
Std. San. Mfg. Co.	532.00
Bankrupt Est.	302.20
	1094.95

Filed Jun. 9, 1930. [36]

[Title of Court and Cause.]

OBJECTION TO MEMORANDUM OF COSTS AND DISBURSEMENTS OF PETITIONING CREDITORS ON DECREE ADJUDICATING BANKRUPTCY.

Comes now Standard Sanitary Manufacturing Company by its attorneys, Armstrong, Lewis & Kramer, and objects to the memorandum of costs and disbursements filed in the above-entitled case by petitioning creditors on the following grounds:

1. That the item of $120 for the reporter's fee for twelve days at $10 per day is not correct, in that one-half of said amount has been heretofore paid by the Standard Sanitary Manufacturing Company to the reporter.

2. That the item of $372 charged for the transcript is not a legitimate item of cost that can be taxed, for the reason that there was no stipulation entered into by and between the parties hereto that said $372 should be an item of taxable costs, and

for the further reason that said reporter was not called by or with the consent of the objecting creditor Standard Sanitary Manufacturing Company.

3. That said transcript covers three sets of exceptions, one advanced by the alleged bankrupt, one by the Crane Company, an objecting creditor, and one [37] by Standard Sanitary Manufacturing Company, an objecting creditor, and that the portion of said transcript which had to do with the exceptions of Standard Sanitary Manufacturing Company is less than one-third of the total transcript.

4. That the item of $65, exceptions overruled on behalf of D. L. and Lyon Francis, is not a properly chargeable cost against Standard Sanitary Manufacturing Company for the reason that said company was not in any way concerned with said exceptions.

5. That the item of $700, examiner's fee, which was allowed by the Judge upon application of said examiner, is not a correct statement, for the reason that of the said amount of $700 the Crane Company has already paid $76, and the Standard Sanitary Manufacturing Company has paid $116.43, making a total of $192.43 heretofore paid on said item of $700, as is shown by said examiner's report to this court.

6. That the item of $200, being the fees and charges for services of the Southwest Audit Company in the examination of the books of Phoenix Plumbing & Heating Company, is not a taxable cost against the Standard Sanitary Manufacturing

Company for the reason that said audit was not authorized or agreed to by the Standard Sanitary Manufacturing Company, nor was there any notice served at any time upon the Standard Sanitary Manufacturing Company that said auditor was to be called. That in truth and in fact, the services of the auditor were a necessary part of the adjudication, and would have been had in any event, whether issues were raised on the petitioning creditors' petition in bankruptcy or not. [38]

7. That heretofore, on February 11, 1930, petitioning creditors filed a memorandum of costs and disbursements in this cause, which said memorandum of costs and disbursements was premature and not warranted by the rules of this court, in that they were not filed upon any judgment at law or in equity, as provided in Rule 35 of the Rules of Practice of the District Court of Arizona, and that said memorandum was prematurely filed for the further reason that it was expressly stipulated by and between the parties in the above-entitled cause that the taxing of costs in the proceedings would be deferred until final judgment was entered by the Judge of this court, and that the first legitimate memorandum of costs and disbursements is the memorandum filed June 2, 1930.

WHEREFORE, Standard Sanitary Manufacturing Company, objecting creditor in the above-entitled cause, objects to each of the items set forth in said memorandum of costs, and prays that the same may be stricken from the memorandum of

costs and disbursements of said petitioning creditors.

ARMSTRONG, LEWIS & KRAMER,
Attorneys for Objecting Creditor Standard Sanitary Manufacturing Company. [39]

[Title of Court and Cause.]

AFFIDAVIT OF FRANK J. DUFFY IN SUPPORT OF OBJECTIONS OF STANDARD SANITARY MANUFACTURING COMPANY TO THE MEMORANDUM OF COSTS AND DISBURSEMENTS OF PETITIONING CREDITORS.

United States of America,
District of Arizona,—ss.

Frank J. Duffy, being duly sworn, on his oath deposes and says:

That he is one of the attorneys of record for the objecting creditor Standard Sanitary Manufacturing Company in the above-entitled cause, and as such has knowledge of the facts herein stated:

1. That heretofore, by stipulation between counsel for the various parties in the above-entitled cause, the Standard Sanitary Manufacturing Company paid one-half of the reporter's fee at the rate of $10 per day for twelve days, and that thereafter Standard Sanitary Manufacturing Company purchased a copy of the transcript of evidence in this case, for which copy the said company paid $85.

That at no time or place was any stipulation made for the payment of $372 for said transcript, nor was there any order or application for order served upon the Standard Sanitary Manufacturing Company or its attorneys for the reporter's transcript at a cost of $372, and that said item of $372 is not chargeable against Standard Sanitary Manufacturing [40] Company, for the reason that no notice whatsoever was given the Standard Sanitary Manufacturing Company of said transcript.

2. That the item of $65, being $5 per exception for thirteen exceptions overruled on behalf of D. L. and Lyon Francis, alleged bankrupt, was not in any shape or manner connected with the objections to the petition in involuntary bankruptcy contained in the answer of Standard Sanitary Manufacturing Company, and that the Standard Sanitary Manufacturing Company was not in any way concerned therewith at any time in the case.

3. That the examiner's fee in the sum of $700 is not an amount paid by the petitioning creditors, for the reason that $192.43 of said $700 has been heretofore paid as follows: $76 paid by the Crane Company and $116.43 paid by the Standard Sanitary Manufacturing Company, making a total of $192.43, which said payments are evidenced by the request of the master or examiner in the above-entitled cause in his petition for assessment of costs for the master's hearing and report.

4. That the charge of $200 for the examination of the books of the Phoenix Plumbing & Heating Company by the Southwest Audit Company is not

a proper charge, in that said audit was not ordered by the master or examiner as a prerequisite to said hearing; that no order, petition for order, or other request was served upon the Standard Sanitary Manufacturing Company for said audit, and that in truth and in fact, if said audit was at all necessary it was a part of the petitioning creditors' case upon the adjudication. That said audit and the testimony of the auditor was nothing more or less than the testimony of [41] an expert witness, and as such is not provided for under the statute providing for costs in this case.

5. That heretofore, on February 11, 1930, a purported memorandum of costs and disbursements was filed by the petitioning creditors herein, but said memorandum was premature in that it was expressly agreed and stipulated by and between the parties hereto, as is shown in Volume 3 of the Transcript of Evidence in this case at page 569 thereof, that the taxing of costs in this proceeding should be made by the court upon final adjudication, viz., the adjudication entered by the court on the 27th day of May, 1930, and that the respective rights of the parties were reserved until said adjudication.

FRANK J. DUFFY.

Subscribed and sworn to before me this 4th day of June, 1930.

AMY SWEEM,
Notary Public.

My commission expires May 29, 1932.

Received copy of the within document this 4 day of June, 1930.

E. O. PHLEGAR,
Attorney for D. L. & Lyon Francis.
ALICE M. BIRDSALL,
Attorney for Petitioning Creditors.

Filed Jun. 4, 1930. [42]

[Title of Court and Cause.]

APPEAL FROM ORDER OF CLERK TAXING COSTS AND DISBURSEMENTS OF PETITIONING CREDITORS ON DECREE ADJUDICATING BANKRUPTCY.

Comes now Standard Sanitary Manufacturing Company by its attorneys, Armstrong, Lewis & Kramer, and appeals to the District Court of the United States from that order of the Clerk of said court dated June 11, 1930, and served upon this company on the 12th day of June, 1930, wherein and whereby the said Clerk taxed the costs and disbursements of the petitioning creditors against the Standard Sanitary Manufacturing Company in the sum of Nine Hundred Ninety-two and 75/100 Dollars ($992.75).

This appeal is made from the items of said order hereinafter set forth:

1. The Standard Sanitary Manufacturing Company appeals from the order of the Clerk assessing the sum of $394.80 as and for reporter's per diem and reporter's transcript, and from the Clerk's

order refusing to divide said sum of $394.80 between Standard Sanitary Manufacturing Company, a corporation, and Crane Company, a corporation, both of which last-named corporations were parties to the issues raised in the above-entitled cause and heard before the Special Master, for the reason that said item should be divided between the two said corporations. [43]

2. Standard Sanitary Manufacturing Company appeals from the order of the Clerk taxing the sum of $350 as the unpaid balance of the Master's fee fixed by this court in the above-entitled cause against this petitioner upon the ground that said sum of $350 should be by said Clerk divided between Standard Sanitary Manufacturing Company and said Crane Company, as both of said companies were parties to the issues raised in the above-entitled cause and tried before the Special Master appointed by this court.

3. Standard Sanitary Manufacturing Company appeals from the order of the Clerk taxing the sum of $200 against Standard Sanitary Manufacturing Company as and for fees and charges of Southwest Audit Company for services in the examination of the books and records of Phoenix Plumbing and Heating Company and report of the assets and liabilities shown therefrom, for the reason that the said charge of $200 was not authorized by this Court or by the Master who heard the case, and

that the same is not taxable as costs within the meaning of the federal statutes.

Respectfully submitted,
STANDARD SANITARY MANUFACTURING COMPANY.
By ARMSTRONG, LEWIS & KRAMER,
Its Attorneys.

Received copy of the within document this 13th day of June, 1930.

ALICE M. BIRDSALL,
Attorney for Petitioning Creditors.

Recd. copy June 14, 1930.

E. O. PHLEGAR.

Filed Jun. 13, 1930. [44]

[Title of Court and Cause.]

April, 1929, Term—Saturday, August 17, 1929—At Phoenix.

Honorable F. C. JACOBS, United States District Judge, Presiding.

MINUTES OF COURT—AUGUST 17, 1929—ORDER GRANTING PETITIONING CREDITORS' PETITION, ETC.

Creditors' petition that the alleged bankrupts herein appear and answer said petition comes on regularly for hearing this date; Alice M. Birdsall appears for said petitioning creditors. Whereupon hearing is now had on said petition, and

IT IS ORDERED that said petition be, and the same is hereby, granted, and that subpoena to allege bankrupts do issue forthwith.

IT IS FURTHER ORDERED that the bond of Momsen-Dunnegan-Ryan Company, a corporation, one of said creditors, in the sum of One Thousand Dollars be, and it is hereby, approved.

Thereupon hearing on creditor's petition for the appointment of a Receiver herein is now had and

IT IS ORDERED that said petition be and the same is granted, and a Receiver hereby appointed, said order appearing in full as follows: [45]

Thursday, August 29, 1929.

MINUTES OF COURT—AUGUST 29, 1929—ORDER EXTENDING TIME TO AND INCLUDING SEPTEMBER 20, 1929, IN WHICH TO FILE ANSWER.

On motion of O. E. Schupp, Esquire, counsel for alleged bankrupt, Leo Francis, IT IS ORDERED that the time within which Leo Francis, a member of the co-partnership herein may answer, be and the same is hereby, extended to and including September 20, 1929.

October, 1929, Term—Saturday, October 19, 1929—
At Phoenix.

Honorable JEREMIAH NETERER, United States District Judge, Specially Assigned, Presiding.

MINUTES OF COURT—OCTOBER 19, 1929—ORDER ALLOWING STANDARD SANITARY MANUFACTURING COMPANY TO FILE AMENDED ANSWER.

On motion of F. J. Duffy, Esq., IT IS ORDERED that the Standard Sanitary Manufacturing Company be, and it is hereby allowed, to file its amended answer herein.

Monday, November 4, 1929.

Honorable F. C. JACOBS, United States District Judge, Presiding.

MINUTES OF COURT—NOVEMBER 4, 1929—ORDER THAT MOTION OF PETITIONING CREDITORS TO STRIKE ANSWERS OF CRANE COMPANY AND STANDARD SANITARY MANUFACTURING COMPANY BE STRICKEN FROM CALENDAR.

On motion of Alice M. Birdsall, Esq., counsel for the petitioning creditors, herein,

IT IS ORDERED that the motion of said petitioning creditors to strike answers of Crane Company and Standard Sanitary Manufacturing Company, be, and the same are hereby, stricken from the calendar.

Monday, February 24, 1930.

MINUTES OF COURT—FEBRUARY 24, 1930—ORDER EXTENDING TIME TEN DAYS TO FILE EXCEPTIONS TO MASTER'S REPORT.

Petition of Special Master for allowance of fee comes on regularly for hearing this day. Frank T. Duffy, Esq., appears as counsel for the petitioning creditor, Standard Sanitary Manufacturing Company. No counsel appearing for the other parties herein,

IT IS ORDERED that the petition of Special Master for allowance of fee be submitted and by the Court taken under advisement.

On motion of Frank T. Duffy, Esq., IT IS ORDERED that the time within which to file exceptions to Master's Report be extended ten days from and after this date.

Subsequently the court having duly considered said petition, the following order is entered. [46]

Monday, March 31, 1930.

MINUTES OF COURT—MARCH 31, 1930—ORDER ALLOWING PETITIONING CREDITORS SEVEN DAYS TO FILE REPLY BRIEF TO BANKRUPTS' EXCEPTIONS TO REPORT OF SPECIAL MASTER.

Exception of D. L. Francis and Lyon Francis and exception of Standard Sanitary Manufacturing

Company to the report of Special Master come on regularly for hearing this day. No appearance is made for D. L. Francis and Lyon Francis; F. T. Duffy, Esquire, appears for Standard Sanitary Manufacturing Company; Alice Birdsall appears for the petitioning creditors.

On motion of counsel for petitioning creditors, IT IS ORDERED that said petitioning creditors be and they are hereby allowed seven days from and after this date within which to file reply brief to Bankrupts' exceptions to report of Special Master.

April, 1930, Term—Monday, April 7, 1930.

MINUTES OF COURT—APRIL 7, 1930—ORDER EXTENDING TIME TO APRIL 14, 1930, FOR PETITIONING CREDITORS TO FILE BRIEF TO EXCEPTIONS.

On motion of Alice M. Birdsall, counsel for the petitioning creditors,—

IT IS ORDERED that the time within which said petitioning creditors may file brief to exceptions upon objection to discharge be extended to April 14, 1930.

Tuesday, May 13, 1930.

MINUTES OF COURT—MAY 13, 1930—ORDER THAT EXCEPTIONS TO REPORT OF SPECIAL MASTER BE SET FOR HEARING MAY 21, 1930.

IT IS ORDERED that the exceptions to the report of Special Master herein and for review be set

for hearing, Wednesday, May 21, 1930, at the hour of eleven o'clock A. M.

Wednesday, May 21, 1930.

MINUTES OF COURT—MAY 21, 1930—ORDER SUBMITTING EXCEPTIONS OF STANDARD SANITARY MANUFACTURING COMPANY, D. L. FRANCIS AND LYON FRANCIS TO REPORT OF SPECIAL MASTER ON PETITION FOR INVOLUNTARY ADJUDICATION.

This cause comes on regularly for hearing to-day pursuant to exceptions of Standard Sanitary Manufacturing Company, D. L. Francis and Lyon Francis to report of Special Master on petition for involuntary adjudication, recommending that Phoenix Plumbing and Heating Company, a co-partnership, Leo Francis, Lyon Francis and D. L. Francis, as individuals, be adjudged bankrupt, heretofore filed herein. E. O. Phlegar, Esquire, appears for D. L. Francis and Lyon Francis; Frank Duffy, Esquire, appears for the Standard Sanitary Manufacturing Company, and Alice M. Birdsall appears for the petitioning creditors. [47]

Hearing is now had on said exceptions which are now duly argued by respective counsel.

And, thereupon, at the hour of 12:20 o'clock P. M., further hearing in this cause is ORDERED continued to the hour of 2:10 o'clock P. M. this date.

Subsequently, at the hour of 2:10 o'clock P. M.,

all counsel being present, further argument is had by respective counsel, and

IT IS ORDERED that said exceptions of Standard Sanitary Manufacturing Company, D. L. Francis and Lyon Francis to the report of the Special Master on petition for involuntary adjudication be submitted and by the Court taken under advisement.

Monday, May 26, 1930.

MINUTES OF COURT—MAY 26, 1930—ORDER OVERRULING OBJECTIONS, APPROVING AND CONFIRMING REPORT OF SPECIAL MASTER AND AWARDING COSTS.

Objections of D. L. Francis and Lyon Francis and Standard Sanitary Manufacturing Company to Special Master's report, having heretofore been argued, submitted and by the Court taken under advisement, and the Court having duly considered the same, and being fully advised in the premises,—

IT IS ORDERED that said objections be overruled, and that said report of Special Master be approved and confirmed, and that costs of said Special Master be awarded against Standard Sanitary Manufacturing Company, to which ruling and order of the court an exception is allowed on behalf of the objectors, D. L. Francis, Lyon Francis and Standard Sanitary Manufacturing Company.

Tuesday, June 10, 1930.

MINUTES OF COURT—JUNE 10, 1930—ORDER OF ADJUDICATION AND REFERENCE.

The petition of Momsen-Dunnegan-Ryan Company, a corporation, Pratt-Gilbert Hardware Company, a corporation, and Union Oil Company of Arizona, a corporation, that Phoenix Plumbing & Heating Co., a co-partnership composed of Leo Francis, Lyon Francis and D. L. Francis, co-partners, and D. L. Francis, Leo Francis and Lyon Francis, as [48] individuals, be adjudged a bankrupt, within the true intent and meaning of the Acts of Congress relating to bankruptcy, having been heard and duly considered, the said Phoenix Plumbing and Heating Company, a co-partnership composed of Leo Francis, Lyon Francis and D. L. Francis, co-partners, and D. L. Francis, Leo Francis and Lyon Francis as individuals are hereby declared and adjudged a bankrupt accordingly.

IT IS THEREFORE ORDERED, that upon the petition filed in this court by or against said bankrupt on the 17th day of August, A. D. 1929, said matter be referred to Hon. R. W. Smith, one of the Referees in Bankruptcy of this court, to take such further proceedings therein as are required by said Acts; and that the said bankrupts shall attend before said Referee on the 23d day of June, 1930, at Phoenix, and thenceforth shall submit to such orders as may be made by said Referee or by this court relating to said involuntary bankruptcy.

Monday, June 23, 1930.

MINUTES OF COURT—JUNE 23, 1930—ORDER TAXING COSTS OF PETITIONING CREDITORS.

Appeal of Standard Sanitary Manufacturing Company from order of Clerk taxing costs herein come on regularly for hearing this day. Alice M. Birdsall is present for the petitioning creditors, Momsen-Dunnegan-Ryan Company, Pratt-Gilbert Company and Union Oil Company; Frank Duffy, Esquire, appears for Standard Sanitary Manufacturing Company.

Argument is now duly had by respective counsel, and

IT IS ORDERED that costs of petitioning creditors be taxed as follows:

Crane Company	$ 260.75
Standard Sanitary Manufacturing Company	532.00
Bankruptcy Estate	302.20
	$1,094.95

Thursday, June 26, 1930.

MINUTES OF COURT—JUNE 26, 1930—ORDER ACCEPTING AND APPROVING BOND ON APPEAL.

IT IS ORDERED BY THE COURT that the bond on appeal, executed June 25, 1930, in the sum of One Thousand Five Hundred Dollars, with the United States *States* Fidelity and Guaranty Company of Baltimore, [49] Maryland, as surety

thereon, and filed in this case June 26, 1930, and the same is hereby accepted and approved.

March, 1930, Term—Wednesday, August 13, 1930—
At Prescott.

MINUTES OF COURT—AUGUST 13, 1930—ORDER EXTENDING TIME TO AND INCLUDING NOVEMBER 3, 1930, FOR STANDARD SANITARY MANUFACTURING COMPANY TO SETTLE STATEMENT OF EVIDENCE.

On motion of E. G. Monaghan, Esquire,—

IT IS ORDERED that the time of the Standard Sanitary Manufacturing Company within which to settle the statement of evidence herein, be extended to and including November 3, 1930.

October, 1930, Term—Monday, November 10, 1930—
At Phoenix.

MINUTES OF COURT—NOVEMBER 10, 1930—ORDER SETTING TIME TO NOVEMBER 17, 1930, FOR SETTLING STATEMENT OF EVIDENCE.

On motion of Thos. W. Nealon, Esq., attorney for the Trustee,—

IT IS ORDERED that statement of evidence herein be set for settlement Monday, November 17, 1930, at the hour of 10:00 o'clock A. M.

Monday, November 17, 1930.

MINUTES OF COURT—NOVEMBER 17, 1930—ORDER EXTENDING TIME TO FEBRUARY 15, 1931, FOR CREDITORS AND TRUSTEES TO FILE SPECIFICATIONS IN OPPOSITION TO DISCHARGE OF BANKRUPTS.

Alice M. Birdsall, Esquire, appears for the petitioning creditors. On motion of said counsel—

IT IS ORDERED that the time within which the creditors and Trustee may file specifications in opposition to discharge of the bankrupts be extended to February 15, 1931.

Monday, November 17, 1930.

MINUTES OF COURT—NOVEMBER 17, 1930—ORDER CONTINUING HEARING OF STATEMENT OF EVIDENCE.

Frank J. Duffy, Esquire, appears for the Standard Sanitary Manufacturing Company, one of the objecting creditors; Alice M. Birdsall, Esquire, appears for the petitioning creditors; Thomas W. Nealon, Esquire, appears for the Trustee.

Statement of the evidence is now presented to the Court and

IT IS ORDERED that this matter be continued for further hearing. [50]

April, 1929, Term—Saturday, August 17, 1929—at Phoenix.

Honorable F. C. JACOBS, United States District Judge, Presiding.

MINUTES OF COURT—AUGUST 17, 1929—ORDER APPOINTING RECEIVER.

In the matter of the petition of Momsen-Dunnegan-Ryan Company, it appearing to the Court that it is absolutely necessary for the preservation of the estate of said alleged bankrupt that a receiver be forthwith appointed, without notice, to take charge of, hold, manage and conduct the estate, property and assets of said bankrupt, and it further appearing that it is for the best interest of said estate that said receiver be authorized to take immediate charge of said estate and to continue the business as a going concern pending the appointment of a trustee herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, That Walter J. Thalheimer be and he is hereby appointed receiver of all the assets and property of each and every kind and character of and belonging to said Phoenix Plumbing and Heating Company, a co-partnership composed of Leo Francis, Lyon Francis and D. L. Francis, co-partners, and D. L. Francis, Leo Francis and Lyon Francis as individuals, and said receiver is hereby clothed with all power and authority of a receiver in bankruptcy in similar cases, and that upon filing a bond as such receiver in the usual form, in the

penal sum of Ten Thousand ($10,000.00) Dollars, the sureties to be approved by the Clerk of this court, said Receiver immediately take possession of all of the assets of said alleged bankrupt.

IT IS FURTHER ORDERED, That said Receiver continue to conduct the business of said alleged bankrupt until the further order of this court, and said Receiver is hereby ordered and directed to immediately take an inventory of the property of said alleged bankrupt and to employ all necessary help for the administration of his trust. [51]

April, 1929, Term—Saturday, August 17, 1929—at Phoenix.

ORDER APPOINTING RECEIVER (CONTINUED).

IT IS FURTHER ORDERED, That said alleged bankrupt, his agents, employees, managers and attorneys, forthwith deliver to said Receiver all of said alleged bankrupt's property, assets and effects now in his or their possession or under his or their control, and that said alleged bankrupts and all persons, firms, corporations and creditors of said alleged bankrupts and each of their attorneys, agents and servants and all sheriffs, marshals and other officers, deputies and their employees hereby jointly and severally be restrained and enjoined from removing, transferring or otherwise interfering with the property, assets and effects of the above alleged bankrupts, and from prosecuting, executing or suing out in any court any process, attachment, re-

plevin or other writ for the purpose of taking possession, impounding or interfering with any property, assets or effects of the above-named alleged bankrupt, and from molesting, disturbing or interfering with said Receiver herein appointed in the discharge of his duties.

Dated this 17th day of August, 1929.

F. C. JACOBS,

Judge of the District Court of the United States in and for the District of Arizona. [52]

October, 1929, Term—Thursday, October 31, 1929—At Phoenix.

Honorable F. C. JACOBS, United States District Judge, Presiding.

MINUTES OF COURT—OCTOBER 13, 1929—ORDER PERMITTING AMENDMENT OF ANSWER.

Pursuant to stipulation of the respective attorneys for the above-named petitioning creditors and Crane Co., a corporation, upon application of said Crane Co.,—

IT IS HEREBY ORDERED that said Crane Co. be given permisison to file an amended answer in said cause on or before the 31st day of October, 1929.

F. C. JACOBS,
District Judge.

Dated, Phoenix, Arizona, October 31st, 1929. [53]

October, 1929, Term—Monday, November 4, 1929—
at Phoenix.

Honorable F. C. JACOBS, United States District
Judge, Presiding.

MINUTES OF COURT—NOVEMBER 4, 1929—
ORDER REFERRING ISSUES TO SPECIAL MASTER.

It appearing that Momsen-Dunnegan-Ryan Company, a corporation, Pratt-Gilbert Hardware Company, a corporation and Union Oil Company of Arizona, a corporation, as petitioning creditors have filed an involuntary petition herein, praying for the adjudication of the Phoenix Plumbing and Heating Company, a co-partnership, composed of Leo Francis, Lyon Francis and D. L. Francis, co-partners; and D. L. Francis, Leo Francis and Lyon Francis as individuals, as bankrupts, and that D. L. Francis and Lyon Francis, alleged bankrupts, and the Standard Sanitary Manufacturing Company, a corporation, a creditor of the alleged bankrupts, and Crane Company, a corporation, a creditor of the alleged bankrupts, have appeared and filed separate answers to said petition; and that Leo Francis, one of the alleged bankrupts, for himself and the Phoenix Plumbing and Heating Company, has filed an admission of willingness to be adjudged a bankrupt,—

NOW, on the motion of Alice M. Birdsall, attorney for said petitioning creditors,—

IT IS ORDERED, that the issues made by said petition and said respective answers be, and they

hereby are, referred to R. W. Smith, Esq., as Special Master, under rule of court to ascertain and report the facts with his conclusions thereon.

Dated this 4th day of November, 1929.

F. C. JACOBS,
District Judge. [54]

October, 1929, Term—Monday, February 24, 1930—at Phoenix.

Honorable F. C. JACOBS, United States District Judge, Presiding.

MINUTES OF COURT—FEBRUARY 24, 1930—ORDER FIXING AND ALLOWING COMPENSATION TO SPECIAL MASTER.

Upon reading the foregoing report and petition of the Special Master in said cause it appears to the Court that the services have been rendered by the said Master as therein reported, and that $27.50 per day including rental expense of office and courtroom is a reasonable allowance therefor; wherefore,—

IT IS ORDERED that the sum of Seven Hundred and no/100 ($700.00) Dollars be, and the same is hereby, fixed and allowed as compensation to said Special Master, R. W. Smith, for the services rendered and expenses incurred.

Dated this 24th day of February, 1930.

F. C. JACOBS,
Judge. [55]

April, 1930, Term—Tuesday, June 10, 1930—at Phoenix.

Honorable F. C. JACOBS, United States District Judge, Presiding.

MINUTES OF COURT—JUNE 10, 1930—DECREE.

This cause having come on to be heard on the exceptions of D. L. Francis and Lyon Francis, alleged bankrupts, and of the Standard Sanitary Manufacturing Company, a creditor, to the report of the Special Master, on petition for involuntary adjudication, filed herein on the 18th day of February, 1930, and the same having been argued by counsel on the 21st day of May, 1930, and submitted, and by the court taken under advisement, and the court having duly considered the same and being fully advised in the premises,—

IT IS ORDERED, ADJUDGED AND DECREED that said objections to said report of said Special Master be overruled, and that said report of said Special Master be approved and confirmed, and that costs of said Special Master taxed at $992.-75, be awarded against the Standard Sanitary Manufacturing Company, in favor of petitioning creditors herein.

IT IS FURTHER ORDERED, that petitioning creditors recover costs taxed at the sum of $———, as costs of said alleged bankrupts, D. L. Francis and Lyon Francis, to be paid out of said bankrupt estate.

IT IS FURTHER ORDERED, that the Phoenix Plumbing and Heating Company, a co-partnership composed of Leo Francis, Lyon Francis and D. L. Francis, co-partners, and D. L. Francis, Leo Francis and Lyon Francis as individuals, be and they hereby are declared and adjudged bankrupts.

AND IT IS ORDERED, that said matter be referred to Hon. R. [56] W. Smith, one of the Referees in Bankruptcy of this court, to take such further proceedings therein as are required by the Acts of Congress relating to bankruptcy, and that the said bankrupts shall attend before said Referee on the 23d day of June, 1930, at Phoenix, and thenceforth shall submit to such orders as may be made by said Referee or by this Court relating to said bankruptcy.

Dated this 10th day of June, 1930.

F. C. JACOBS,
District Judge. [57]

April, 1930, Term—Wednesday, June 25, 1930—at Phoenix.

Honorable F. C. JACOBS, United States District Judge, Presiding.

MINUTES OF COURT—JUNE 25, 1930—ORDER GRANTING AND ALLOWING PETITION FOR APPEAL AND FIXING AMOUNT OF BOND.

Frank Duffy, Esquire, appears for the objecting creditor Standard Sanitary Manufacturing Company, and presents petition for appeal, and hearing is now duly had on said petition, and

IT IS ORDERED that said petition for appeal be granted and that appeal be allowed, and that bond of said objecting creditor on appeal be fixed in the sum of One Thousand Five Hundred Dollars. [58]

April, 1930, Term — Monday, June 30, 1930 — At Phoenix.

Honorable F. C. JACOBS, United States District Judge, Presiding.

MINUTES OF COURT — JUNE 30, 1930 — ORDER CONTINUING TIME TO JULY 15, 1930, FOR FILING STATEMENT OF EVIDENCE.

It appearing to the court that it is necessary to extend the time for filing statement of the evidence in the appeal filed in the above-entitled cause by the Standard Sanitary Manufacturing Company, a corporation,—

IT IS ORDERED that the time for filing statement of the evidence in the above-entitled cause be and the same hereby is extended to the 15th day of July, 1930.

Dated this 30th day of June, 1930.

F. C. JACOBS,
Judge. [59]

April, 1930, Term — Monday, July 14, 1930 — At Phoenix.

Honorable F. C. JACOBS, United States District Judge, Presiding.

MINUTES OF COURT — JULY 14, 1930 — ORDER EXTENDING TIME FOR FILING STATEMENT OF EVIDENCE.

Upon the petition of the Standard Sanitary Manufacturing Company, a corporation, appellants in the above-entitled case, it appearing to the court that for good cause shown the time for filing the statement of evidence in said appeal should be extended,—

IT IS HEREBY ORDERED that the time for filing the Statement of Evidence on the appeal of the Standard Sanitary Manufacturing Company, a corporation, in the above cause be and it is hereby extended thirty days from the 15th day of July, 1930, and that the said appellant have to and including the 15th day of August, 1930, to file said statement of the evidence.

Dated this July 14, 1930.

F. C. JACOBS,
Judge. [60]

April, 1930, Term—Thursday, July 17, 1930—At Phoenix.

Honorable F. C. JACOBS, United States District Judge, Presiding.

MINUTES OF COURT — JULY 17, 1930 — ORDER FOR TRANSMISSION OF ORIGINAL EXHIBITS.

This matter coming on regularly to be heard this 17th day of July, 1930, and it appearing to the satisfaction of the Court that certain exhibits filed in the above-entitled cause at the hearing before the Special Master, are not capable of being copied, and that they should be transmitted to Appellate Court in their original forms for examination by such court,—

NOW, THEREFORE, IT IS HEREBY ORDERED, that petitioning creditors exhibits Numbers 5, 14 and 16, in evidence, may be transmitted in their original forms, with the transcript of record, to the United States Circuit Court of Appeals for the Ninth District, without the necessity of making copies thereof.

Done in open court, this 17th day of July, 1930.

F. C. JACOBS,
United States District Judge. [61]

April, 1930, Term—Thursday, August 14, 1930—At Prescott.

MINUTES OF COURT — AUGUST 14, 1930— ORDER SETTING TIME TO NOVEMBER 11, 1930, FOR SETTLEMENT OF STATEMENT OF EVIDENCE.

It appearing to the court that all of the parties hereto have agreed and stipulated that the statement of evidence filed herein, be set down for settlement before this court on the 11th day of November, 1930,—

IT IS HEREBY ORDERED that the statement of evidence filed in this court be set down for settlement on the 11th day of November, 1930.

Dated this 14th day of August, 1930.

F. C. JACOBS,
Judge. [62]

October, 1930, Term—Thursday, February 5, 1931 —At Phoenix.

MINUTES OF COURT—FEBRUARY 5, 1931— ORDER EXTENDING TIME TO MAY 15, 1931, TO FILE SPECIFICATIONS IN OPPOSITION TO DISCHARGE OF D. L. FRANCIS.

It appearing to the court that an order and decree of adjudication in bankruptcy in the above-entitled matter was made and entered in this court on the 26th day of May, 1930, and that thereafter an appeal from said order and decree was taken by the

Standard Sanitary Manufacturing Company, a creditor of said bankrupt, which appeal is now pending and undetermined.

And it further appearing to the court that by reason of said appeal the petition for discharge of said bankrupt, D. L. Francis, cannot be considered by the court until after the determination of said appeal,—

IT IS THEREFORE ORDERED by the court that the time within which the trustee in bankruptcy, and the creditors of said bankrupt, who have heretofore entered their appearance in opposition to the discharge of said bankrupt, D. L. Francis, may file their specifications of objections to said discharge be, and the same is hereby extended to the 15th day of May, 1931.

Dated this 5th day of February, 1931.

F. C. JACOBS,
Judge. [63]

October, 1930, Term—Monday, February 16, 1931—
At Phoenix.

MINUTES OF COURT—FEBRUARY 16, 1931—
ORDER ALLOWING TIME TO JANUARY 15, 1931, TO FILE STATEMENT OF EVIDENCE.

Alice M. Birdsall, Esquire, appears on behalf of the petitioning creditors. Thomas W. Nealon, Esquire, is present on behalf of the Trustee. Frank J. Duffy, Esquire, appears on behalf of the objecting creditors and the appellant herein, and

IT IS ORDERED that the appellant herein, Standard Sanitary Manufacturing Company, be allowed to February 25, 1931, within which to file its statement of evidence. [64]

October, 1930, Term—Monday, March 16, 1931—At Phoenix.

MINUTES OF COURT—MARCH 16, 1931—ORDER EXTENDING TIME TO AND INCLUDING MARCH 18, 1931, TO FILE STATEMENT OF EVIDENCE, ETC.

Petition of the objecting creditor, Standard Sanitary Manufacturing Company, to extend time within which to docket record in the Circuit Court of Appeals to April 15, 1931, comes on regularly for hearing this day. Frank J. Duffy, Esquire, is present on behalf of the Objecting Creditor, Standard Sanitary Manufacturing Company. Thomas W. Nealon, Esquire, is present on behalf of the Trustee. Alice M. Birdsall, Esquire, is present on behalf of the petitioning creditors.

Counsel for the petitioning creditors now files answer to petition of the objecting creditor, Standard Sanitary Manufacturing Company, to extend time within which to docket record in the Circuit Court of Appeals to April 15, 1931, and counsel for the Trustee files his objections to said petition.

Argument is now duly had by respective counsel, and

IT IS ORDERED that said petitioner be granted an extension of time to and including the 18th day

of March, 1931, within which to file statement of the evidence, and

IT IS FURTHER ORDERED that the time of said petitioner within which to file and docket record on appeal in the United States Circuit Court of Appeals be extended to and including the 21st day of March, 1931, upon the conditions set forth in the stipulation of the parties heretofore filed herein. [65]

October, 1930, Term—Monday, March 16, 1931—At Phoenix.

MINUTES OF COURT—MARCH 16, 1931—ORDER EXTENDING TIME TO AND INCLUDING MARCH 18, 1931, FOR SETTLEMENT OF STATEMENT OF EVIDENCE.

It appearing to the court that a stipulation has heretofore been entered into by and between the parties hereto for the extension of the time for settling the statement of evidence in the above-entitled case to the 18th day of March, 1931,—

IT IS ORDERED that the time for settling the statement of evidence in the above-entitled case be extended to and including the 18th day of March, 1931.

Dated this 16th day of March, 1931.

F. C. JACOBS, [66]

October, 1930, Term—Saturday, March 21, 1931—
At Phoenix.

MINUTES OF COURT—MARCH 21, 1931—ORDER TRANSMITTING ORIGINAL EXHIBITS.

This matter coming on to be heard this 21st day of March, 1931, and it appearing to the satisfaction of the court that all of the parties in the above-entitled cause have consented to the application filed in the above-entitled case, and it further appearing to the satisfaction of the court that Petitioning Creditors' Exhibits 7, 14, 18, 19, 20 and 21 filed in the above-entitled case at the hearing thereof before the Special Master are incapable of being copied and that they should be transmitted to the Appellate Court in their original form for examination by such court,—

NOW, THEREFORE, IT IS HEREBY ORDERED that Petitioning Creditors' Exhibits 7, 14, 18, 19, 20 and 21 may be transmitted in their original forms with the transcript of record to the United States Circuit Court of Appeals for the Ninth Circuit without the necessity of making copies thereof.

Done in open court this 21st day of March, 1931.

F. C. JACOBS,
United States District Judge. [67]

(Contract in Evidence, Ex. No. 1, Petitioning Creditors.)

(Certified copy substituted by stipulation.)

B–522.

PETITIONERS' EXHIBIT No. 1.
In Evidence.
11–20–29.

PLUMBING CONTRACT.

THIS AGREEMENT made and entered into this the 5th day of September, 1928, by and between D. L. Francis, Leo Francis and Lyon Francis, all of Phoenix, Arizona, a co-partnership, doing business under the firm name of Phoenix Plumbing and Heating Company, hereinafter designated the Contractors, the first party, and Phoenix Union High School District, Maricopa County, Arizona, by its Board of Education, hereinafter designated the Owner, the second party, WITNESSETH:

That in consideration of the covenants and agreements herein contained to be and by them kept and performed, it is hereby agreed by and between the parties above named as follows, to-wit:

1. The Contractors, to the satisfaction and under the direction of the Owner and Fitzhugh and Byron, the Architects for the Owner, shall and will provide all the material and perform all the work to install the plumbing in the Junior College Building, in accordance with the drawings and specifications, prepared therefor by Fitzhugh & Byron, Archi-

tects, which drawings and specifications signed for identification by the parties hereto are hereby declared to be a part of this contract.

2. The Architects shall furnish to the contractors such further drawings or explanations as may be necessary to detail and illustrate the work to be done, and the contractors shall conform to the same as far as they may be consistent with the original drawings and specifications referred to and identified as provided in paragraph 1.

3. Should the Owner at any time during the progress of said work require any alterations in, deviations from, additions to, or omissions from the said contract, specifications or drawings, it shall have the right and power to make such change or changes, and the same shall in no way effect or make void [68] this contract, but the difference in the work omitted or added shall be deducted from or added to the amount of the contract. No work of any description shall be considered extra unless a separate estimate in writing of the same, before its commencement, shall have been submitted by the contractors to the Owner and Architects, and their signatures obtained thereto. Should any dispute arise respecting the true construction or meaning of the drawings or specifications, or respecting the true value of any work to be omitted or added, the same shall be decided by the architects in charge, and their decision shall be final and conclusive, subject to arbitration as provided in the General Conditions of the Specifications.

4. The work embraced in this agreement shall

be executed under the immediate charge of, and under the sole responsibility of said contractors until said work be fully and finally completed and delivered to and accepted by the Owner and its Architects and the contractors shall assume responsibility for any damage which may occur to the building or materials during the work of this contract, except that the owner will carry fire insurance as hereinafter provided. The said contractors shall be responsible for any and all damage to persons and property during the performance of said work occasioned by his own act or neglect or that of any of his employees. The said contractors shall hold the said Owner harmless and free from expense or loss of any and every nature which may result from injury or damage sustained by any person or persons or damage to any property of any and all kinds which may result from any claim or claims, suit or suits, of any and every nature, as a result of the said contractors carrying on the work herein provided for. The Contractors shall carry from the time of the beginning of their operations until the completion of the same, approved employer's liability insurance to cover all claims for [69] injuries to their employees engaged in said work.

5. The Owner shall have the said building insured after its walls and superstructure are started, and shall from time to time increase such insurance as the work progresses, and the said policy shall have a clause showing the contractors' rights to such portion of the insurance as their interest

may appear. The contractors shall assume all responsibility for materials on the ground.

6. Said contractors shall pay all workmen the wage scale prevailing in the community and shall in all respects, in the performance of the work of this contract, observe the laws of the said State, especially a certain statute, being Chapter 1, Title XIV, of the Arizona Civil Code, 1913, and shall protect and save harmless said Owner, its officers and agents, from liability or loss on account of any violation of any laws of Arizona in the performance of the work of this contract.

7. The contractors shall provide sufficient, safe and proper facilities at all times for the inspection of the work by the Architects. They shall within twenty-four hours after receiving written notice from the Architects to that effect, proceed to remove from the grounds or the building all materials condemned or rejected, whether worked or unworked, and to take down all portions of the work which the Architects shall by like written notice condemn or reject as unsound or improper, or as in any way failing to conform with the drawings and specifications.

8. Should the contractors refuse or neglect at any time to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, [70] such refusal, neglect, or failure being ascertained by the Architects, the Owner shall be at lib-

erty after two days' written notice to the contractors, given through the Architects, to provide any such labor or materials and to deduct the cost thereof from any money then due or thereafter to become due to the contractors under this contract; and in the case of the discontinuance of the employment of the contractors, they shall not remove any appliances or materials from the grounds or building, neither shall they be entitled to receive any further payment under this contract until the work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the Owner in finishing the work such difference shall be paid by the Owner to the contractors; but if such expense shall exceed such unpaid balance, the contractors shall pay the owner the difference.

9. Should the contractors be obstructed or delayed during the prosecution of or completion of the work by the act, neglect, delay, or default of the owner or the architects, or by any damage which might happen by fire, lightning, earthquake, or cyclone, or by the abandonment of the work by the employees through no fault of the contractors, then the time herein fixed for the completion of the work, shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid, but no such allowance shall be made unless a claim therefor is presented to the Architects within forty-eight hours of the occurance of such delay, and the duration of such extension shall be certified by the Architects and a copy thereof furnished the owner and the contractors. Until said

building is completed, the contractors shall work in co-operation with any other contractors, or other persons engaged in the proper furnishing of labor and materials, or the installation of any fixtures for or in the said building. [71]

10. The contractors agree that they will perform the work of this contract expeditiously as fast as the building is ready to receive it and will complete all work within 130 working days from date of this contract.

11. Upon the faithful performance by the contractors of all the conditions and requirements of this agreement, the owner hereby agrees and promises to pay to the said contractors, the sum of Eight Thousand, Four Hundred, Twenty-four and No/100 Dollars ($8,424.00).

All payments to be made upon estimates and certificates of the Architects upon the first and fifteenth days of each month for seventy-five (75%) per cent of the amount of labor and material having entered into the building and materials having been delivered on the site since the preceding payment, the final payment of twenty-five (25%) per cent reserved from previous estimates or installment payments shall be made as soon after completion of the building as the contractors shall furnish satisfactory evidence that all claims against the building have been satisfied. The contractors shall promptly pay all sub-contractors, material men, *labors*, and other employees as often as payments are made to them by the owner, and shall as a condition of any such partial payments, if required, furnish to said owner satisfactory evidence

that all sub-contractors, material men, laborers, and other employees upon said building, have been fully paid up to such time and shall deliver said work free from any claims on account of such sub-contractors, material men, laborers or other employees, and in the event of their failing at any time to pay such claims, the owner may retain from all subsequent estimates and pay over to such sub-contractors, material men, laborers and other employees, such sums as may from time to time be due them respectively. No certificate given or payment made under this [72] contract, except the final certificate of final payment, shall be conclusive evidence of the performance of this contract either wholly or in part, and no payment shall be construed to be an acceptance of defective work or improper material. Nothing herein contained shall be construed as an undertaking on the part of the Owner to be responsible to any material men, laborers, or sub-contractors on account of any material furnished or labor performed upon said building in any amount whatsoever. Before final settlement is made, the contractors shall furnish satisfactory evidence to the owner that the work covered by this contract is free and clear from all claims for labor or material, and that no claim then exists for which liens could be enforced or filed if said building were owned by a private individual.

12. This Contract shall not be in force or effect until the contractors shall execute a bond for the faithful performance of this contract in the penal sum of Eight Thousand, Four Hundred, Twenty-

four and No/100 Dollars ($8,424.00) with Surety Company satisfactory to the Owner.

13. It is covenanted and agreed between the parties hereto for themselves, their administrators, excutors, successors and assigns, that this contract and all its terms and provisions shall be final and binding upon them and each and every one of them.

IN TESTIMONY WHEREOF, the said Contractors have hereunto affixed their signatures and the Owner has caused this agreement to be subscribed by its Board of Education, the day and year first herein above mentioned.

PHOENIX PLUMBING & HEATING CO.
CO.

LYON FRANCIS,
LEO FRANCIS,
D. FRANCIS,
Contractors.

PHOENIX UNION HIGH SCHOOL DISTRICT,
By BOARD OF EDUCATION,
President.
LOUIE GAGE DENNETT,
Clerk,
Trustee. [73]

BOND.

KNOW ALL MEN BY THESE PRESENTS: That we, D. L. Francis, Leo Francis and Lyon Francis, as principals, and American Bonding Company of Baltimore organized and existing under the laws of Maryland duly authorized to do

business as a surety company and to become surety upon bonds in the State of Arizona, as surety herein, are held ad firmly bound unto Phoenix Union High School District, of Maricopa County, Arizona, in the penal sum of Eight Thousand, Four Hundred, Twenty-four and No/100 Dollars ($8,-424.00) gold coin of the United States of America, to be paid said School District, to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seal and dated this 5th day of September, 1928.

THE CONDITION of this obligation is such that:

WHEREAS, under and by virtue of a certain agreement in writing entered into on the 5th day of September, 1928, by and between the above bounden principals, D. L. Francis, Leo Francis and Lyon Francis, and the said Phoenix Union High School District, whereby, in consideration of the payment to the above bounden principals of a certain sum of money, the said principals agree to provide all the materials and perform all the work mentioned in the specifications and shown upon the drawings prepared by Fitzhugh & Byron for the installation of a plumbing system, to the satisfaction and under the direction of said architects, in the Junior College Building for the said Phoenix Union High School District, excepting, however, that said work might deviate from said

plans and specifications and be subject to changes thereto in the manner provided in said contract, a [74] copy of which said contract is hereto attached and by reference made a part of this bond as though fully and completely written therein.

NOW, THEREFORE, if the above bounden D. L. Francis, Leo Francis and Lyon Francis, their heirs, executors, administrators, successors or assigns, or either of them, shall well and truly perform all of the agreements of the said contract to be performed upon their part in the manner and form and at the time stated and specified in said contract, then this obligation shall be void; otherwise to be and remain in full force and virtue.

PHOENIX PLUMBING & HEATING CO.

LYON FRANCIS,
LEO FRANCIS,
D. FRANCIS,
Principals.

AMERICAN BONDING COMPANY OF BALTIMORE.
By KINGSBURY SMITH, (Seal)
Attorney-in-fact,
Surety.

I, J. W. Laur, of the State of Arizona, County of Maricopa, hereby certify that the above is a true and exact copy of the original contract between the Phoenix Plumbing and Heating Company and the Phoenix Union High School District.

J. W. LAUR.

Subscribed and sworn to before me, a Notary Public, of the State of Arizona, County of Mari-

copa, on this day, November 19, 1929, at Phoenix, Arizona.

P. S. BASSFORD,
Notary Public. [75]

B–522. Petitioner's Exhibit No. 1 In evidence. 11–20–29.

Endorsed on back of exhibit: Report of Special Master. Filed Feb. 18, 1930. C. R. McFall, Clerk. United States District Court for the District of Arizona. By H. F. Schlittler, Deputy Clerk. [76]

B.–522.

PETITIONERS' EXHIBIT No. 2.

In Evidence.

11–20–29.

NAME—D. Leo Francis.

KIND OF BUSINESS—Plumbing & Heating.

ADDRESS—316 North 6th Ave., Phoenix, Arizona.

PHOENIX PLUMBING & HEATING CO.

INDIVIDUAL OR PARTNERSHIP STATEMENT.

To the Com'l. Nat. Ban. BANK OF Phoenix, Ariz.

For the purpose of obtaining credit with you from time to time I herewith submit the following as being a fair and accurate statement of my financial condition on Oct. 15, 1927.

ASSETS.

Cash on hand and in bank 258.54
Notes Receivable .....
(Give due dates and details of important items on reverse)
Accounts Receivable 1056.00
(Give full details of important items on reverse)
Salable Merchandise (How valued).....3700.00
United States Government Securities.....
(.....Horses @.....
Live (.....Cattle @.....
Stock (.....Sheep @.....
(.....Hogs @.....
Estimated Value Growing Crop.

Acres	Crop	Yield	Price	Total

Total Quick Assets.....5014.54
Real Estate (List on reverse) .....
Machinery and Tools (Actual value) Inventory and office fixtures—3 Trucks..2500.00
2–F C A Rs
Other Stocks and Bonds (List on reverse)
Other Assets (Describe) .....

Total 7514.54

[77]

LIABILITIES.

Notes Payable, to banks.....	
(Give due dates and details on reverse)	
Other Notes Payable	
(Give due dates and details on reverse)	
Open Accounts Payable	
Chattel Mortgages on (Not legible).....	
due .....192..	2670.00
Other indebtedness	
(Give full details on reverse)	
Total Current Debts..	2670.00
Mortgages or Liens on Real Estate, due .....192....	
Total Liabilities	2670.00
Net Worth	4844.54
Total	7514.54

Liability as endorser for others—$———

Are any of above assets pledged to secure indebtedness? ———

Life Insurance carried—$10000.00. Payable to—Wife.

Fire Insurance on personal property—$1000.00.

On buildings—$———. Do you carry Employers Liability Insurance? Yes.

Are any suits or litigation pending either for or against firm? No. Details ———

Signed—D. LEO FRANCIS.

(Over) [78]

I have a statement dated April 2, 1928, signed by Leo Francis.

B.–522.

PETITIONERS' EXHIBIT No. 3.

In Evidence.

11–20–29.

NAME—Phoenix Plumbing & Heating Co.
KIND OF BUSINESS ————
ADDRESS—316 N. 6th Ave.

INDIVIDUAL OR PARTNERSHIP STATEMENT.

To the Commercial Natl. Bank of Phoenix, Arizona.

For the purpose of obtaining credit with you from time to time I herewith submit the following as being a fair and accurate statement of —— financial condition on April 2, 1928.

ASSETS.

Cash on hand and in bank 1758.50
Notes Receivable .....
(Give due dates and details of important items on reverse)
Accounts Receivable 2878.20
(Give full details of important items on reverse)
Salable Merchandise (How valued .....) 8700.00
Contracts as attach list.....19012.10
United States Government Securities.....

(.....Horses @.....
Live (.....Cattle @.....
Stock (.....Sheep @.....
(.....Hogs @.....

Estimated Value Growing Crop.

Acres	Crop	Yield	Price	Total

Total Quick Assets.....32348.80

Real Estate (List on reverse) .....
Machinery and Tools (Actual value)..... 1400.00
Other Stocks and Bonds (List on reverse).
Other Assets (Describe) .....
.....

Total 33348.80

[79]

LIABILITIES.

Notes Payable, to banks..... 1350.00
(Give due dates and details on reverse)
Other Notes Payable .....
(Give due dates and details on reverse)
Open Accounts Payable 3970.00
Chattel Mortgages on..... 1701.00
due .....192....
Other indebtedness .....
(Give full details on reverse)
For Labor and Material to finish Contract work 14200.00

Total Current Debts.....21221.00

Mortgages or Liens on Real Estate, due ..... 192..... .....

Total Liabilities	21221.00
Net worth	12127.80
Total	33348.80

Liability as endorser for others—$ ~~None.~~

Are any of above assets pledged to secure indebtedness? None.

Life Insurance carried—$11500.00. Payable to—Parents.

Fire Insurance on Personal property—$2000.00. On Buildings—$ None. Do you carry Employers' Liability Insurance? Yes.

Are any suits or litigation pending either for or against firm? None. Details ———.

Signed—LEO FRANCIS.

(Over) [80]

B.–522.

PETITIONERS' EXHIBIT No. 4.

In Evidence.

11–20–29.

IMPORTANT—Note if NAME, BUSINESS and ADDRESS correspond with your inquiry.

Rv.

PHOENIX PLUMBING & HEATING COMPANY (NOT INC.)

PHOENIX, ARIZONA,
Maricopa County,
316 N. 6th Ave.

Blbg. & Heating Contrs.

D. L. Francis, aged 34, married.
Lyon Francis, aged 23, married.
Leo Francis, aged 22, married.

(Y) Cond. 24200 August 18th, 1928.

RECORD.

This business was started a number of years ago by another; however, on October 1, 1927, Leo Francis succeeded to same and for a time he operated individually although the above are now given as owners. The Francis family came from Fort Smith, Ark., where they were identified with the same line, although for a time, Leo Francis was at Kanowa, Okla., where he was known as a solicitor.

STATEMENTS.

A statement as of October 1, 1927, furnished by Leo Francis over his signature, and showing him-

self as the owners of the business included total assets of $7,520, liabilities $2,670, and surplus $4,850.

A statement from actual inventory of May 31, 1928, signed Phoenix Plumbing & Heating by Paul E. Gehree, cashier is now furnished, same showing the above as partners and financial condition as follows:

ASSETS.		LIABILITIES.	
Mdse. on hand ..	6,042.95	For Mdse. not due....	7,195.3
Outstanding Accts.	2,642.78	Loans from bank	4,000
Notes Recv.	223.40	Int. Cont. Payable....	1,845.0
Cash on hand & Bk.	1,684.38	Cap. Investment Accts.	15,236.5
Machy Fixts. etc.	2,244.75		
Deposits on plans & Bids	1,138		
Due on contracts.	14,300.73		
	$28,276.99		$28,276.9

Insurance on merchandise—$1,800. On machinery and fixtures—$500. Annual rent—$636. Annual sales (Estimated)—$120,000.

GENERAL INFORMATION.

The present statement shows considerably increased assets in comparison with the one of October, 1927, however since latter date, a good business has been done and some progress is conceded. As noted, they have quite a large amount due on

contracts, as well as outstanding accounts and while total liabilities are large, they are not regarded as out of proppportion to their total assets. The owners maintain good banking connections, carry a fair balance there usually, and have been extended accommodations at times. Affairs are capably managed, those interested are well regarded, they have done well as stated, having handled a number of large contracts since their business was established.

FIRE HAZARD: The building occupied is a one-story building, the front being of cement block while the rear is of frame [81] and *and* sheet iron. On one side and close is a brick residence, while on the other side and on a corner, is a two-story brick building. The lower floor is occupied by a grocery, bakery, and restaurant, while the second floor is used as a rooming-house.

TRADE REPORT

HC. ORDER OWE DUE. PAYS.

3500 Prompt

688 Discount

FIRE RECORD

None.

Y–8–18–28 (CCO.)

Bk CN N. Q. to G 3

T. R. (24200–SSMCO–5495) [82]

[Title of Court and Cause.]

DEBTOR'S SCHEDULES.

LEO FRANCIS, doing business under the name and style of Phoenix Plumbing and Heating Company, at Phoenix, in the county of Maricopa, state of Arizona, in the Federal District of Arizona, Phoenix Division, respectfully represents:

That he has had his principal place of business at Phoenix, in Maricopa county, Arizona, for the greater portion of ——— years next immediately preceding the filing of the Creditors' Petition praying that he be adjudged a bankrupt;

That he has filed herein his Admission of Willingness to be adjudged a bankrupt;

That he is willing to surrender all his property for the benefit of his creditors except such as is exempt by law, and desires to obtain the benefit of the Acts of Congress relating to Bankruptcy.

That the schedule hereto annexed, marked A (1, 2, 3, 4, 5), and varified by his oath, contains a full and true statement of all his debts, and (so far as it is possible to ascertain), the names and places of residence of his creditors and such further statements concerning said debts as are required by the provisions of said acts.

That the schedule hereto annexed, marked B (1, 2, 3, 4, 5, 6), and verified by his oath, contains an accurate statement of all his property, both real and personal, and such further statements con-

cerning said property as are required by the provisions of said acts.

LEO FRANCIS,
Bankrupt.

O. E. SCHUPP,
Attorney for Bankrupt.

United States of America,
Federal District of Arizona,
County of Maricopa,—ss.

I, Leo Francis, doing business under the name and style of Phoenix Plumbing and Heating Company, one of the debtors mentioned and described in the above-entitled action, do hereby make solemn oath that the statements contained in the schedules hereto attached are true according to the best of my knowledge, information and belief.

[Seal] LEO FRANCIS,
Bankrupt.

Subscribed and sworn to before me this 17th day of September, 1929.

[Seal] O. E. SCHUPP.

My commission expires February 15, 1932. [83]

N. B.—"Debts" shall include any debt, demand or claim provable in bankruptcy. Sec. 1 [11]

N. B.—"Creditor" shall include anyone who owns a demand or claim provable in bankruptcy and may include his duly authorized agent, attorney or proxy. Sec. 1 [9]

SCHEDULE A.

STATEMENT OF ALL DEBTS OF BANKRUPT.

SCHEDULE A. (1)

Statement of all creditors who are to be paid in full or to whom priority is secured by law.

CLAIMS WHICH HAVE PRIORITY

Reference to Ledger or Voucher.—Names of Creditors.—Residence (if unknown, that fact to be stated.) Where and when contracted.—Nature and consideration of the debt, and whether contracted as a partner or joint contractor; and if so, with whom.		AMOUNT
	[1.] Taxes and debts due and owing to the United States.	
		None.
Reference to Ledger or Voucher.—Names of Creditors.—Residence (if unknown, that fact to be stated.) Where and when contracted.—Nature and consideration of the debt, and whether contracted as a partner or joint contractor; and if so, with whom.	[2.] Taxes due and owing to the state of..... or to any county, district or municipality thereof.	
	Maricopa County and State of Arizona by Phoenix Plumbing & Heating Co.....	217 6
	City of Phoenix, Arizona, by Phoenix Plumbing & Heating Co., $99.92, by Leo Francis, $5.36, Total.....	105 2

erence to Ledg- or Voucher.— ames of Credi- rs.— Residence unknown, at fact to be ated.) Where d when con- acted.—Na- re and consid- ation of the bt, and wheth- contracted as partner or nt contractor; d if so, with om.

[3.] Wages due workmen, clerks or servants to an amount not exceeding $300.00 each, earned within three months before filing this petition.

Earl Shipp, 6 days @ $4.00 per day.....	24 00
Lyon Francis, 6 days @ $10.00 per day.....	60 00
B. H. Purcell, Yuma, Arizona, 8½ da. @ $10.00 per day	85 00

erence to Ledg- or Voucher.— ames of Credi- rs.— Residence unknown, at fact to be ated.) Where d when con- acted.—Na- re and consid- ation of the bt, and wheth- contracted as partner or nt contractor; d if so, with om.

[4.] Other debts having priority by law.

None

Total.....491 91

LEO FRANCIS, Petitioner. [84]

Full sets of schedule blanks must be l. If there are no items applicable ny particular blanks, such fact should stated in said blank. Each schedule et must be signed.)—**Rule 14.**

N. B.—"Debts" shall include any debt, demand or claim provable in bankruptcy. Sec. 1 [11]

N. B.—"Creditor" shall include anyone who owns a demand or claim provable in bankruptcy and may include his duly authorized agent, attorney or proxy. Sec. 1 [9]

SCHEDULE A.

STATEMENT OF ALL DEBTS OF BANKRUPT.

SCHEDULE A. (1)

Statement of all creditors who are to be paid in full or to whom priority is secured by law.

CLAIMS WHICH HAVE PRIORITY

		AMOUNT
Reference to Ledger or Voucher.—Names of Creditors.—Residence (if unknown, that fact to be stated.) Where and when contracted.—Nature and consideration of the debt, and whether contracted as a partner or joint contractor; and if so, with whom.	[1.] Taxes and debts due and owing to the United States.	None.
Reference to Ledger or Voucher.—Names of Creditors.—Residence (if unknown, that fact to be stated.) Where and when contracted.—Nature and consideration of the debt, and whether contracted as a partner or joint contractor; and if so, with whom.	[2.] Taxes due and owing to the state of..... or to any county, district or municipality thereof.	
	Maricopa County and State of Arizona by Phoenix Plumbing & Heating Co.....	217 63
	City of Phoenix, Arizona, by Phoenix Plumbing & Heating Co., $99.92, by Leo Francis, $5.36, Total.....	105 28

rence to Ledg-
or Voucher.—
mes of Credi-
s.— Residence
unknown,
t fact to be
ted.) Where
l when con-
acted.—Na-
e and consid-
tion of the
ot, and wheth-
contracted as
partner or
nt contractor;
l if so, with
om.

[3.] Wages due workmen, clerks or servants to an amount not exceeding $300.00 each, earned within three months before filing this petition.

Earl Shipp, 6 days @ $4.00 per day.....	24 00
Lyon Francis, 6 days @ $10.00 per day.....	60 00
B. H. Purcell, Yuma, Arizona, 8½ da. @ $10.00 per day	85 00

rence to Ledg-
or Voucher.—
mes of Credi-
s.— Residence
unknown,
t fact to be
ted.) Where
l when con-
acted.—Na-
e and consid-
tion of the
ot, and wheth-
contracted as
partner or
nt contractor;
l if so, with
om.

[4.] Other debts having priority by law.

None

Total.....491 91

LEO FRANCIS, Petitioner. [84]

Full sets of schedule blanks must be
. If there are no items applicable
ny particular blanks, such fact should
stated in said blank. Each schedule
t must be signed.)—**Rule 14.**

1

N. B.—"Debts" shall include any debt, demand or claim provable in bankruptcy. Sec. 1 [11]

N. B.—"Creditor" shall include anyone who owns a demand or claim provable in bankruptcy and may include his duly authorized agent, attorney or proxy. Sec. 1 [9]

SCHEDULE A.

STATEMENT OF ALL DEBTS OF BANKRUPT.

SCHEDULE A. (1)

Statement of all creditors who are to be paid in full or to whom priority is secured by law.

CLAIMS WHICH HAVE PRIORITY

Reference to Ledger or Voucher.—Names of Creditors.—Residence (if unknown, that fact to be stated.) Where and when contracted.—Nature and consideration of the debt, and whether contracted as a partner or joint contractor; and if so, with whom.		AMOUNT
	[1.] Taxes and debts due and owing to the United States.	
		None.
	[2.] Taxes due and owing to the state of..... or to any county, district or municipality thereof.	
	Maricopa County and State of Arizona by Phoenix Plumbing & Heating Co.....	217 63
	City of Phoenix, Arizona, by Phoenix Plumbing & Heating Co., $99.92, by Leo Francis, $5.36, Total.....	105 28

Reference to Ledger or Voucher.— Names of Creditors.— Residence (if unknown, that fact to be stated.) Where and when contracted.—Nature and consideration of the debt, and whether contracted as a partner or joint contractor; and if so, with whom.

[3.] Wages due workmen, clerks or servants to an amount not exceeding $300.00 each, earned within three months before filing this petition.

Earl Shipp, 6 days @ $4.00 per day.....	24 00
Lyon Francis, 6 days @ $10.00 per day.....	60 00
B. H. Purcell, Yuma, Arizona, 8½ da. @ $10.00 per day	85 00

Reference to Ledger or Voucher.— Names of Creditors.— Residence (if unknown, that fact to be stated.) Where and when contracted.—Nature and consideration of the debt, and whether contracted as a partner or joint contractor; and if so, with whom.

[4.] Other debts having priority by law.

None

Total.....491 91

LEO FRANCIS, Petitioner. [84]

(Full sets of schedule blanks must be filed. If there are no items applicable to any particular blanks, such fact should be stated in said blank. Each schedule sheet must be signed.)—**Rule 14.**

2

SCHEDULE A. (2)

CREDITORS HOLDING SECURITIES.

(N. B.—Particulars of securities held, with dates of same, and when they were given, to be stated under the names of the several creditors, and also particulars concerning each debt, as required by the Acts of Congress relating to Bankruptcy, and whether contracted as partner or joint contractor with any other person, and if so, with whom.)

Reference to Ledger or Voucher—Names of creditors.—Residence (if unknown, that fact must be stated).—Description of securities.—When and where debts were contracted. Value of securities.	AMOUNT OF DEBTS
Standard Sanitary Manufacturing Company, Phoenix, Arizona, estimated at..	39,552 62
Partially secured by following assignments:	
Balance on contract with W. H. Brown for work on Hospital for the Insane; amount of contract $7,270.05, credits $4,080.00, balance assigned May 7, 1929	3,190.05
Contract with the City of Phoenix, Phoenix, Arizona, for construction of new City Hall; amount of contract $23,-233.85 with extras, credited $14,526.00, balance assigned May 7, 1929...8,707.85	
This job was taken over Southern Surety Company, bondsman, for completion.	
Contract with Phoenix Union High School for Central Heating Plant; amount of contract and extras $29,326.10, credited $25,819.00, balance assigned May 7, 1929	3,507.10
This job was taken over by the Massachusetts Bonding Company for completion.	

Contract with Phoenix Union High School for Junior College Building; amount of contract and extras $8,424.00, credited $6,318.00; balance assigned May 7, 1929 .....2,106.00

Job Uncompleted

Contract with Phoenix Union High School for Library and Class Room building; amount of contract and extras $18,860.00, credited $9,450.00; balance assigned May 7, 1929 .....9,410.12

This job was taken over by American Bonding Company for completion.

Unable to give actual or approximate amounts received or that may be received by the Standard Sanitary Mfg. Co., on above assignments.

The Crane Company, Phoenix, Arizona.

The Crane Estimated at 5,551 33

Partially secured by the following assignments:

Contract with O. R. Bell, Contractor, job at 23 W. Monroe St., Phoenix, $289.91 ..... 289.91

Contract with O. R. Bell, job at 917 N. 8th St., Phoenix 400.00

Amount due from E. J. Bennitt, Country Club Drive, Phoenix, Arizona...1,000.00

Amount due from Harry Tritle No. Alvarado St., Phoenix, Ariz.....800.00

Forward Total 45,103 95

(Full sets of schedule blanks must be filed. If there are no items applicable to any particular blanks, such fact should be stated in said blank. Each schedule sheet must be signed.)—Rule 14.

LEO FRANCIS, Petitioner. [85]

Forward.....45,103.95

Schedule A–2, page 2. Crane Co. Cont.

Amount due on contract with Green & Hall on Dan Campbell Residence; amount of contract and extras $1597.-55, credited $900.00, balance due $697.55, $500.00 of which assigned to Crane Co. 500.00

Amount due from James Barnes, W. Latham St. 271.49

Contract with Green & Hall of Schwenker residence, $2934.00, credited, $1300.00, balance assigned 1,634.00

This job taken over by Massachusetts Bonding Co., for completion.

Contract with Hogan & Farmer on Marana Teachers College, Marana, Arizona, Contract $1127.00 credited $500.00, balance $627.00, assigned..... 627.00

Unable to give actual or approximate amounts received or that may be received by the Crane Company on above assignments.

Total.....48,136.44

LEO FRANCIS. [86]

SUGGESTION

(In filing this blank, be careful to strictly follow form which requires a statement as to "nature and consideration of debts; and whether any judgment," etc.)

SCHEDULE A. (3)

CREDITORS WHOSE CLAIMS ARE UNSECURED.

(N. B.—When the name and residence (or either) of any drawer, maker, indorser, or holder of any bill or note, etc., are unknown, the fact must be stated, and also the name and residence of the last holder known to the debtor. The debt to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property.)

Reference to Ledger or Voucher.—Names of creditors.—Residence (if unknown, that fact must be stated).—When and where contracted.—Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, etc., and whether contracted as partner or joint contractor with any other person; and if so, with whom.

	AMOUNT
Arizona Grocery Company, Phoenix, Arizona	2 25
Arizona Printers, Inc., Phoenix, Arizona	28 25
Arizona Concrete Co., Phoenix, Arizona	181 87
Arizona Republican, Phoenix, Arizona	64 00
Atlas Valve Co., 282 South St., Newark, N. J.	337 56
Arizona Hardware Supply Co., Phoenix, Arizona	8 92
Armstrong Machine Works, Three Rivers, Mich.	79 92
Allison Steel Mfg. Co., Phoenix, Arizona	317 42
Arizona Battery & Equipment Co., Phoenix, Arizona	322 73
Arizona Storage & Distributing Co., Phoenix, Arizona	15 00

A. & A. Motor Co., 301 N. Central Ave., Phoenix, Ariz.	24 63
Arizona Directory Co., 1240 S. Main St., Los Angeles, Calif.	10 00
Arizona Plumbing & Supply Co., Phoenix, Arizona	29 65
Aetna Life Insurance Company, Hartford, Conn.	12 94
Arizona Highway Department, Phoenix, Arizona	4 80
Bobrick Chemical Corp., 111–117 Gary St., Los Angeles, Cala.	26 56
A. C. Brauer Company, St. Louis, Mo.	5 55
The Builder & Contractor	24 00
Boston Store, Phoenix, Arizona	20 82
Capitol Foundry Co., Phoenix, Arizona	8 20
Central Arizona Light and Power Co.	6 55
Commercial National Bank, Phoenix, Arizona	6,100 00
Credit Audit Co., 1931 Ry. Exchange Bldg., St. Louis, Mo.	5 55
Vernon Clark, Phoenix, Arizona	2 55
Edwards, Wildey & Dixon Co., Phoenix, Arizona	7 25
Five Points Blacksmith Shop, Phoenix, Ariz.	35 55
The Elliott Engineering Company, About.	2,680 00
Joe Francis, balance a/c money loaned, Phoenix, Arizona	60 00
Don Gilmore, Inc., Phoenix, Arizona	5 80
The Gazette Co., Inc., Phoenix, Ariz.	15 00
Gila Valley Plumbing & Heating Co., Safford, Ariz.	11 99

Glauber Bros. Mfg. Co., Cleveland, Ohio..	69 64
Hulse & Dick, Ford Dealers, Yuma, Arizona	6 00
J. D. Halstead Lumber Co., Phoenix, Arizona	116 20
E. R. Hill, Phoenix, Ariz.....	30 00
Heinz, Bowen & Harrington, Phoenix, Arizona	29 25
A. J. Keen, 316 N. 6th Ave., Phoenix, Arizona	30 00
Los Angeles Mfg. Co., Los Angeles, Calif..	596 80
Total	

(Full sets of schedule blanks must be filed. If there are no items applicable to any particular blanks, such fact should be stated in said blank. Each schedule sheet must be signed.)—Rule 14.

LEO FRANCIS, Petitioner. [87]

Page 3 Continued.

Mathews Paint Co., Phoenix, Arizona....	73 10
O. B. Marston, Phoenix, Arizona.....	2 20
Milwaukee Valve Co., Milwaukee, Wisconsin	301 00
Momsen, Dunnegan & Ryan, Phoenix, Arizona	486 08
McArthur Bros., Phoenix, Arizona.....	32 30
J. H. McCarty, Phoenix, Arizona.....	11 00
Merchants Police Patrol, Phoenix, Arizona	2 00
M. & M. Welding Co., Phoenix, Arizona..	88 60
Mt. States Tel. & Tel. Co., Phoenix, Arizona	~~22~~ ~~70~~
New Hale Electric Co., Phoenix, Arizona.	4 23
Fred Noll Tire Service, Phoenix, Arizona	~~44~~ ~~50~~
Total.....	12,297 91

LEO FRANCIS,
Petitioner. [88]

O. E. Specialty Mfg. Co., Phoenix, Arizona	166 24
Oil Burning Equipment Co., Phoenix, Arizona	3,225 00
Powers Regulator Co., 2720 Greenview Ave., Chicago, Ill.....	131 25
Phoenix Arizona Club, Phoenix, Arizona.	15 00
Phoenix Auto Supply Co., Phoenix, Arizona	50 91
The Peoples Transfer Co., Phoenix, Arizona	19 56
Pratt Gilbert Hardware Co., Phoenix, Arizona	73 31
Postal Telegraph Co., Phoenix, Arizona. .	19 80

Public Service Brass Company	448 50
The Phoenician, Phoenix, Arizona	10 00
The Phoenix Roofing & Supply Co., Phoenix, Arizona	92 50
Pacific Construction Co., Phoenix, Arizona	17 00
W. M. Pepper, Phoenix, Arizona	531 95
Phoenix Tempe Stone Co., Phoenix, Arizzona	34 00
Phoenix Blue Print Co., Phoenix, Arizona	75
Pace Hardware Co., Safford, Arizona	35 10
Pure Food Cafe, Miami, Arizona	27 25
P. & M. Mfg. Co., 622 E. 4th St., Los Angeles, Calif.	9 48
Rio Grande Oil Company, Phoenix, Arizona	295 71
Chas. H. Richeson, Atty., Phoenix, Arizona	10 00
Southwestern Cement & Plaster Products Co.	18 00
Standard Insurance Agency, Phoenix, Arizona	272 67
Star Sheet Metal Works, Phoenix, Arizona	118 64
S. W. Sash & Door Co., Phoenix, Arizona	23 45
Southwestern Mfg. & Supply Co., Phoenix, Arizona	2,108 00
Sun Drug Co., Phoenix, Arizona	1 00
O. S. Stapley Co., Phoenix, Arizona	1.95
E. F. Sanguinetti, Yuma, Arizona	10 67
Silas Plumbing Co., Yuma, Arizona	125 00
N. R. Tomsen	313 66
Talbot & Hubbard, Phoenix, Arizona	50

Letis R. Templin, Phoenix, Arizona	5 00
The Desert Express, Yuma, Arizona	150 00
Union Oil Company, Phoenix, Arizona ...	384 55
Western Union Telegraph Co., Phoenix, Arizona	5 58
Welker & Son Transfer Co., Safford, Arizona	165 01
Yuma Central Auto Co., Yuma, Arizona..	6 60
Western Builders, Phoenix, Arizona	639 49
M. L. Vieux, Phoenix, Arizona	55 00
The Gazetteer Pub. & Printing Co., Denver, Colo.	15 00
Plaza Stone Cottages, Miami, Arizona....	12 25
Total	9,643 24

LEO FRANCIS,
Petitioner. [89]

4

SCHEDULE A. (4)

LIABILITIES ON NOTES OR BILLS DISCOUNTED WHICH OUGHT TO BE PAID BY THE DRAWERS, MAKERS, ACCEPTORS OR INDORSERS.

(N. B.—The dates of the notes or bills, and when due, with the names, residences and the business or occupation of the drawers, makers, acceptors or indorsers thereof, are to be set forth under the names of the holders. If the names of the holders are not known, the name of the last holder known to the debtor shall be stated, and his business and place of residence. The same particulars as to notes or bills on which the debtor is liable as indorser.)

Reference to Ledger or Voucher.—Names of holders so far as known.—Residence (if unknown, that fact must be stated). —Place where contracted.—Nature of liability, and whether same was contracted as partner or joint contractor or with any other person; and if so, with whom.	AMOUNT
None.	
TOTAL	

(Full sets of schedule blanks must be filed. If there are no items applicable to any particular blanks, such fact should be stated in said blank. Each schedule sheet must be signed.)—Rule 14.

LEO FRANCIS, Petitioner. [90]

5

SCHEDULE A. (5)

ACCOMMODATION PAPER.

(N. B.—The dates of the notes or bills, and when due, with the names and residences of the drawers, makers, acceptors, and indorsers thereof, are to be set forth under the names of the holders; if the bankrupt be liable as a drawer, maker, acceptor, or indorser thereof, it is to be stated accordingly. If the names of the holders are not known, the name of the last holder known to the debtor should be stated, with his residence. State particulars as to other commercial paper.)

Reference to Ledger or Voucher.—Names of holders.—Residence (if unknown, that fact must be stated).—Names and residences of persons accommodated.—Place where contracted.—Whether liability was contracted as partner or joint contractor, or with any other person; and if so, with whom.	AMOUNT
None.	

TOTAL.....

(Full sets of schedule blanks must be filed. If there are no items applicable to any particular blanks, such fact should be stated in said blank. Each schedule sheet must be signed.)—Rule 14.

LEO FRANCIS, Petitioner. [91]

OATH TO SCHEDULE A.

For the Federal District of Arizona, Phoenix, Division.

United States of America,
Federal District of Arizona,—ss.

In the Matter of Momsen-Dunnegan-Ryan Co., et al., Petitioners, vs. Phoenix Plumbing and Heating Company, Leo Francis, Doing Business Under the Name and Style of Phoenix Plumbing & Heating Company, et al., Alleged Bankrupts, in Bankruptcy No. B.–522—Phoenix.

On this —— day of September, A. D. 1929, before me personally came Leo Francis, the person mentioned in and who subscribed to the foregoing Schedule, and who being by me first duly sworn, did declare the said Schedule to be a statement of all his debts, in accordance with the Acts of Congress relating to Bankruptcy.

LEO FRANCIS.

Subscribed and sworn to before me, this 17th day of September, 1929.

[Seal] O. E. SCHUPP,
Notary Public.

My commission expires February 13, 1932.

(This Oath to Follow Schedule A–5.) [92]

8

SCHEDULE B. (2)
PERSONAL PROPERTY

		Dollars	Cents
A. Cash on hand.		None	
B. Bills of exchange, promissory notes, or securities of any description (each to be set out separately).		None	
C. Stock in trade in ..... business of ..... at ..... of the value of	Plumbing & Heating, 316 N. 6th Ave., Phoenix, Ariz., about $3,000.00: Consists of plumbing supplies of all kinds, pipe, lead, brass fixtures, connections, etc.	3,000	00
	Plumbing supplies at Yuma, purchased for Yuma High School Job but not used in construction of building, about	500	00
D. Household goods and furniture, household stores, wearing apparel and ornaments of the person, viz:	Wearing apparel and ornaments	50	00
E. Books, prints, and pictures, viz:	Cash-book, account receivable book, Contract-book and time-book, no particular value.		
F. Horses, cows, sheep and other animals (with number of each), viz:	None.		

G. Carriages and other vehicles, viz:	1 Star Truck, $50.00; 1 Chevrolet truck, $200.00, (claimed exempt), and 1 Ford Truck, $150.00	400 00
H. Farming stock and implements of husbandry, viz:	None.	
I. Shipping and shares in vessels, viz:	None.	
K. Machinery, fixtures, apparatus and tools used in business, with the place where each is situated, viz:	1–Toledo power drive thread cutting machine $100.00; 1–Bench vice $25.00; 1–36″ Stilson wrench $2.50; 1–36″ Chain tong $2.50; 1 pipe cutter from 2½ to 4″ $4.00; 1 claw-hammer $0.35¢; 1–ball peon-hammer $0.50; 1–single jack-hammer $0.75; 1 monkey-wrench $0.50; 4–rock points $1.00; 2–cold chisels $0.70¢; 1–14″ Stilson $1.00; 1–10″ Stilson $0.75¢; 2–18″ Stilsons $2.50; 2–24″ Stilsons $3.00; 1–trimo pipe cutter from ¼ to 2″ $2.50; 1–#1A Toledo stocks from 1 to 2″ $8.00; 1–#0 Toledo stocks from ⅜ to 1″ $5.00; 1–Toledo stocks from 2½ to 4″, $15.00; 1–pipe reaner $0.00; 1–brace & bit $0.75, 1–rod spud wrench $1.00. Total.....	177 30
L. Patent, copyrights and trademarks, viz:		
M. Goods or personal property of any other description, with the place where each is situated, viz:	All claimed as exempt. L. none. M. none.	
	Total.....	4,127 30

(Full sets of schedule blanks must be filed. If there are no items applicable to any particular blanks, such fact should be stated in said blank. Each schedule sheet must be signed.)—Rule 14.

LEO FRANCIS, Petitioner. [93]

7

SCHEDULE B.

STATEMENT OF ALL PROPERTY OF BANKRUPT.

SCHEDULE B. (1)

REAL ESTATE.

Location and description of all real estate owned by debtor, or held by him. Incumbrances thereon, if any, and dates thereof. Statement of particulars relating thereto.	ESTIMATED VALUE
None.	
TOTAL.....	

(Full sets of schedule blanks must be filed. If there are no items applicable to any particular blanks, such fact should be stated in said blank. Each schedule sheet must be signed.)—Rule 14.

LEO FRANCIS, Petitioner. [94]

SCHEDULE B (3)

CHOSES IN ACTION.

		Dollars	Cents
A. Debts due petitioner on open account.	See separate sheets following.....	$3,724	24
B. Stock in incorporated companies, interest in joint stock companies, and negotiable bonds.	None.		
C. Policies of Insurance.	Aetna Life Insurance Company, Hartford, Connecticut	00	00
D. Unliquidated claims of every nature, with their estimated value.	See separate sheets following.....	35,657	79
E. Deposits of money in banking institutions and elsewhere.	None.		
	TOTAL.....	39,383	03

(Full sets of schedule blanks must be filed. If there are no items applicable to any particular blanks, such fact should be stated in said blank. Each schedule sheet must be signed.)—Rule 14.

LEO FRANCIS, Petitioner. [95]

Schedule B.–3–A.

ACCOUNTS RECEIVABLE.

A. Z. Root Beer Co., Phoenix Arizona	1.50
Arizona Landscape Gardners, Phoenix, Arizona	36.75
Mr. Atwater, c/o Phoenix Linen Supply Co., Phoenix, Arizona	19.90
Mrs. Anderson, 1760 E. Princeton St., Phoenix, Arizona	5.30
Mrs. Archer, 101 E. Coronado St., Phoenix, Arizona	18.00
Mrs. Abraham, 900 E. Moreland, Phoenix, Arizona	1.00
Arizona Scales Co., 306 N. Center St., Phoenix, Ariz.	31.00
Mrs. Antrim, 905 W. Palm Lane, Phoenix, Arizona	1.35
Arizona Garment Mfg. Co., Phoenix, Arizona.	35.75
Beers & Clever, Phoenix, Arizona	27.05
L. M. Byrd, 1325 W. Monroe St., Phoenix, Arizona	22.15
Fred Barrows, 1721 W. Jefferson St., Phoenix, Arizona	3.50
W. E. Brooks, 12 S. 18th Avenue, Phoenix, Arizona	4.95
B. A. Banks, 1226 E. Garfield St., Phoenix, Arizona	1.75
Booker T. Washington Hospital, 1342 E. Jefferson St., Phoenix	2.40
A. C. Baker, 1422 N. Central Ave., Phoenix	14.60

Bob Baker, 929 E. Coronado St., Phoenix, Arizona 5.15
Bob Brazee, 1043 E. Highland Ave., Phoenix, Arizona 9.35
Dr. Brown, 1106 W. Washington St., Phoenix, Ariz. 120.63
Mr. Balke, Balke Bldg., Phoenix, Arizona.. 4.50
O. R. Bell, Phoenix, Arizona 2.00
Central Arizona Light & Power Co., Phoenix, Arizona 4.00
Ethel Clark, 1218 W. Monroe St. 15.35
Mr. Cousins, 751 E. Van Buren St., Phoenix, Arizona 12.00
Mr. Coulson, 1125 N. 2nd St., Phoenix, Arizona 1.75
J. J. Cox, 2230 N. 7th St., Phoenix, Arizzona 2.60
Mrs. E. S. Caldren, 1125 N. 2nd St., Phoenix, Arizona 1.50
C. C. Cragin, 517 W. McDowell Road, Phoenix, Arizona 3.20
Mrs. Carnes, 328 N. 4th Ave., Phoenix, Arizona 30.00
Otto Christopher, 1006 S. 3rd Ave., Phoenix, Arizona 2.65
Crane Co., Phoenix, Arizona 5.00
Jas. Coster, 375 N. 6th Avenue, Phoenix, Arizona 2.20
F. M. Corwin, 841 N. 7th Avenue, Phoenix, Arizona 2.25
Maricopa Tuberculosis Hospital, Phoenix, Arizona 4.95

Mr. Connell, 64 W. Holly St., Phoenix, Arizona 2.65
W. G. Dodson, 623 W. Adams St., Phoenix, Arizona 14.65
R. E. Davey, 702 E. Jefferson St., Phoenix, Arizona 3.75
Dean's Grocery, 703 N. 2nd St., Phoenix, Arizona 10.90
Mr. Dorris, Indian School Road & 9th Ave., Phoenix, Ariz. 4.00
Mrs. Dougherty, 900 N. 7th St., Phoenix, Arizona 3.00
Mrs. Mary Dunlap, 330 W. Latham St., Phoenix, Ariz. 2.55
H. S. Dorman, c/o Lincoln Mortgage Co., Phoenix, Arizona 4.85
W. W. Dunn, 1141 W. Lincoln St., Phoenix, Arizona 1.75
Mrs. Betty Dameron, 804 N. 5th Ave., Phoenix, Arizona 11.75
Dixie Hotel, 4th Avenue & Washington St., Phoenix, Ariz. 3.05
C. B. Evans, 1215 Woodlawn Avenue, Phoenix, Arizona 3.50
W. A. Evans, 3320 N. Central Avenue, Phoenix, Arizona 21.89
Mrs. T. L. Edens, 520 N. 9th Ave., Phoenix, Arizona 1.50
Mrs. Ellios, 340 W. Latham St., Phoenix, Arizona 9.20
Harold Foote, 2028 W. Monroe St., Phoenix, Arizona 1.50

Mrs. V. C. Ferguson, 4029 N. Vernon St., Phoenix, Arizona 5.00
J. Fundenburg, 318 N. 6th Avenue, Phoenix, Arizona 2.60
Five Points Barber Shop, Phoenix, Arizona 2.50
E. L. Freeland, 100 W. Roosevelt St., Phoenix, Arizona 5.15
First Baptist Church, 3rd Ave. & Monroe Sts., Phoenix 3.45
Mrs. J. Friedman, 1126 E. Willetta St., Phoenix, Ariz. 1.50
First Methodist Church, 2nd Ave. & Monroe Sts., Phoenix 4.30
Mr. Foster, c/o Barber Shop 1.95
Mrs. D. Francis, 88 Mitchell Drive, Phoenix, Ariz. 2.50

[96]

Schedule B.–3–A.

Accounts Receivable—Continued.

Mr. Gold, 225 E. Washington St., Phoenix, Arizona 1.50
Mrs. Galbraith, 1410 N. 2nd St., Phoenix, Arizona 6.15
B. M. Guffith, 1595 E. McDowell, Phoenix, Arizona 5.90
Mr. Goyer, 337 N. 6th Ave., Phoenix, Arizona 6.75
Nick Gannis, 415 Oakland Street, Phoenix, Arizona 4.50
Fred Gardner, 916 S. 7th Ave., Phoenix, Arizona 5.83
Walter Godman, Phoenix, Arizona 29.16

H. U. Gold, 1114 N. 2nd St., Phoenix, Arizona 12.00
H. Grimshaw, 390 N. 4th Avenue, Phoenix 2.25
Mr. Giveno, 634 N. 2nd Avenue, Phoenix, Arizona 3.40
Mrs. A. E. Holmer, 2005 W. Adams St., Phoenix, Ariz. 19.75
Mr. Henderson, 801 N. 10th Avenue, Phoenix, Ariz. 3.00
Marshall Humphrey, 1021 E. Willetta St., Phoenix, Ariz. 9.05
Miss Haul, c/o Lincoln Mortgage Co., Phoenix, Arizona 3.85
Samuel Haldeman, 15 W. Washington St., Phoenix, Ariz. 6.35
Hollywood Service Station, 902 W. Van Buren St., Phoenix 27.48
F. J. Halterman, 1202 W. Adams, Phoenix, Arizona 2.00
Mr. Hunt, 417–15 Oakland St., Phoenix, Ariz. 2.85
L. G. Harvey, 1122 W. Latham St., Phoenix, Arizona 7.27
Hi-Way Coffee Shop, Phoenix, Arizona.. 4.10
Mrs. Harvey, 108 N. 21st Ave., Phoenix, Arizona 1.25
Mr. Hoagland, 127 E. Palm Lane, Phoenix, Arizona 7.51
Mrs. J. B. Harrison, 704 N. Central Ave., Phoenix, Ariz. 2.75
Mrs. Humphreys, 822 N. 6th Ave., Phoenix, Arizona 16.55

Mr. Hyder, 511 N. 5th St., Phoenix, Arizona 4.15
Henderson Bros., N. 7th Ave., Phoenix, Arizona 1.75
Ingleside Inn, Phoenix, Arizona 59.65
G. W. Johns, 217 N. 16th Avenue, Phoenix, Arizona 3.20
Dalton Johnson, 2134 W. Jefferson St., Phoenix, Ariz. 2.60
Geo. A. Johnson, Toggery Shop, Mesa, Arizona 9.45
H. A. Jones, Five Points, Phoenix, Arizona 4.42
Mr. Johnson, 1010 W. Madison St., Phoenix, Ariz. 2.15
Jesse Hat Shop, Phoenix, Arizona..... 6.58
Mr. Johnson, 1107 Grand Avenue, Phoenix, Arizona 1.10
R. C. Ketchum, 401 N. 7th Avenue, Phoenix, Arizona 37.90
Mrs. Helen Kinsella, 610 N. 4th Avenue, Phoenix, Ariz. 5.70
B. Kilepher, 806 N. 3rd Avenue, Phoenix, Arizona 2.60
P. M. Kerrick, 81 W. Willetta St., Phoenix, Ariz. 2.55
Mrs. Kolling, 374 Verde Lane, Phoenix, Arizona 3.50
Mrs. Harry Konophy, Phoenix, Arizona... 1.50
Lorraine Beauty Shop, 210 O'Neil Bldg., Phoenix, Ariz. 14.10
D. A. Little, 2109 W. Filmore St., Phoenix, Arizona 2.65

G. H. Lutgerding, E. Country Drive, Phoenix, Arizona 21.90
Lebanon Hotel, 333 N. 2nd Avenue, Phoenix, Arizona 98.95
Mrs. Thomas Lewis, 712 S. 7th St., Phoenix, Arizona 50.68
Mrs. Lane, 42 W. Culver St., Phoenix, Arizona 3.85
Mrs. Lindquist, 608 W. Van Buren St., Phoenix, Arizona 2.80
L. L. Lindsey, 1310 W. Moreland St., Phoenix, Arizona 1.89
Mrs. T. R. Lewis, 421 Southern Avenue, Phoenix, Arizona 21.72
Lincoln Mortgage Co., 1513 W. Taylor St., Phoenix, Ariz. 4.10
Mrs. R. Littlefield, 622 N. 6th Ave., Phoenix, Arizona 1.50
Mrs. Luke, 715 E. Washington St., Phoenix, Ariz. 2.65
Maricopa County, Phoenix, Arizona 128.90
Mrs. Mitchell, 507 E. Moreland St., Phoenix, Ariz. 3.50
H. L. Medinger, 158 W. Merrill St., Phoenix, Arizona 9.10
Mrs. J. H. Moore, 524 W. Portland St., Phoenix, Ariz. 8.20

[97]

Schedule 3–B.–A.

Accounts Receivable—Continued.

Mr. Moss, 46 W. Lewis St., Phoenix, Arizona 1.45

Mr. E. W. Montgomery, 537 E. Moreland St., Phoenix, Ariz.	6.95
Moeller Apartments, 2nd Ave. & Filmore St., Phoenix	11.75
Modern Auto Court, 1930 W. Van Buren St., Phoenix, Ariz.	5.25
Mrs. Mathias, 816 N. 2nd St., Phoenix, Ariz.	4.75
Lee Moffitt, Phoenix, Arizona	31.28
L. W. McHattan, 1114 W. Lynwood St., Phoenix, Ariz.	8.80
Mc. McCray, 2615 N. 16th St., Phoenix, Ariz.	1.75
C. F. McConnell, Casa Grande, Arizona	158.11
Norman Landscape Gardners, 1509 N. Central Ave., Phoenix	38.46
North Central Coffee Shop, 506 N. Central Ave., Phoenix	55.40
Mrs. Nile, 1111 W. Adams St., Phoenix, Arizona	29.50
W. H. Nelson, Phoenix, Ariz.	5.40
Newcomers Realty Co., Phoenix, Arizona	1.60
Mr. Nickerson, 840 N. 1st Avenue, Phoenix, Ariz.	1.75
A. D. Nace, 1540 W. Washington St., Phoenix, Arizona	28.59
J. E. Nelson, 1705 W. Jefferson St., Phoenix, Arizona	6.15
Mrs. H. L. Nace, 1546 W. Washington St., Phoenix, Ariz.	3.10
W. D. Northern, Phoenix, Arizona	7.50
New York Bakery, 248 E. Washington St., Phoenix, Ariz.	73.20

J. G. O'Malley, 1202 N. 2nd St., Phoenix, Arizona 2.05
Phoenix Union High School District, Phoenix, Ariz. 1.75
E. E. Pascoe, 14 E. Adams St., Phoenix, Arizona 3.35
Wm. Pepper, 1st St. & McKinley, Phoenix, Ariz. 115.00
F. L. Perry, 722 N. 7th St., Phoenix, Arizona 1.35
R. H. Parsons, 1422 N. 2nd St., Phoenix, Ariz. 12.20
Mrs. Palmer, 315 E. Thomas Road, Phoenix, Ariz. 2.00
Phoenix Tent & Awning Co., 226 W. Adams St., Phoenix, Ariz. ..... .56
Phoenix Hotel, 1st & Jefferson Sts., Phoenix, Ariz. 2.00
J. B. Petty, 1345 Grand Avenue, Phoenix, Arizona 4.45
Phoenix Lunch Room, 231 E. Washington St., Phoenix, Ariz. 8.90
Pay'n Takit Garage, 5th Ave. & Washington Sts., Phoenix 18.75
Mr. Rubenstein, 2028 Richland Ave., Phoenix, Ariz. 29.25
Ranch House Land Co., 16 W. Roosevelt St., Phoenix, Ariz. 4.35
L. H. Rhuart, 720 E. McDowell, Phoenix, Arizona 12.20
R. G. Reid, 2529 Dayton St., Phoenix, Arizona 3.30

Jas. Rymer, c/o Packard Motor Co., Phoenix, Ariz. 28.95
Mr. Randell, 1310 W. Willetta St., Phoenix, Ariz. 5.85
Mrs. S. B. Richards, 810 N. 1st Ave., Phoenix, Ariz. 5.20
D. Rubenstein, c/o Western Builders, Phoenix, Arizona 14.22
State of Arizona, Phoenix, Arizona 91.63
Mrs. Lee, 140 N. Central Ave., Phoenix, Ariz. 9.95
Standard Sanitary Mfg. Co., Phoenix, Arizona 517.85
Mr. Shackelford, 231 W. Jefferson St., Phoenix, Ariz. 1.50
Mr. Stellar, 925 N. 9th Ave., Phoenix, Ariz. 1.45
Mr. Stillett, 825 N. 9th Ave., Phoenix, Arizona 1.75
H. L. Stine, 1819 W. Jefferson St., Phoenix, Ariz. 101.20
R. F. Soule, 1336 E. Moreland, Phoenix, Arizona 1.25
Stearnman Construction Co., Phoeniz, Arizona 72.45
Mrs. Shaw, 72 Mitchell Drive, Phoenix, Arizona 4.50
Dr. Stoner, 429 Ellis Bldg., Phoenix, Arizona 4.40
S. A. Sprague, 834 E. Palm Lane, Phoenix, Arizona 1.00
Ralph Summers, 1217 E. Culver St., Phoenix, Arizona 7.10

T. J. Smith, 1221 E. Monroe St., Phoenix, Arizona 18.20

[98]

Schedule 3–B.–A.

Accounts Receivable—Continued.

Southwestern Mfg. Co., Phoenix, Arizona.. 135.05
Mrs. Stevens, 1204 W. Washington St., Phoenix, Ariz. 1.35
Mr. Stone, 743 E. Portland St., Phoenix, Ariz. 2.80
Star Sheet Metal Works, Phoenix, Arizona. 2.40
Mr. Treadwell, 1027 N. 11th St., Phoenix, Arizona 4.50
Mr. Towne, 4024 N. Vernon, Phoenix, Arizona 6.55
H. R. Tritle, 611 N. Central Ave., Phoenix, Ariz. 1.25
E. W. Thayer, Phoenix, Arizona 171.47
Mr. Towles, 756 E. Moreland St., Phoenix, Arizona 3.10
J. Thornton, 333 W. Latham St., Phoenix, Ariz. 6.10
Mrs. H. B. Tracy, Phoenix, Arizona 4.05
Mr. Turley, Tempe, Arizona 21.00
W. A. Thompson Electrical Co., 123 W. Adams St., Phoenix, Ariz. 1.18
Mr. Taylor, 2021 Alvarado St., Phoenix, Arizona 15.50
W. H. Tate, 720 N. 7th Ave. 1.25
J. C. Tudy, Woodlea St., Phoenix, Arizona. 11.95
Mr. Tootle, 955 W. Moreland St., Phoenix, Ariz. 30.80

Mr. Urban, 636 N. 3rd Ave., Phoenix, Ariz.. 2.90
G. W. Vickers, 840 N. 1st Ave., Phoenix, Ariz. 5.75
E. O. Van Rheim, 313 N. 20th Ave., Phoenix, Ariz. 4.50
Mr. Woodbridge, R. F. D. #7, Box 1180, Phoenix, Arizona 9.20
Mr. Warren, 825 E. Sheridan St., Phoenix, Ariz. 2.00
J. M. Wilson, 404 N. 7th Ave., Phoenix, Ariz. 11.75
Mr. Williams, 1218 N. 3rd St., Phoenix, Ariz. 3.50
M. E. Waddoups, 2020 N. Central Avenue, Phoenix, Ariz. 7.90
J. W. Walker, Ellis Bldg., Phoenix, Arizona 58.10
Winsor Mule Market, Phoenix, Arizona ... 3.70
Mrs. Grace Wright, 1722 W. Jackson St., Phoenix, Ariz. 6.11
Elmer Warren, 1508 W. Filmore St., Phoenix, Ariz. 15.00
W. A. Walker, 2107 W. Adams St., Phoenix, Arizona 7.95
W. A. Washburn, 324 N. 9th Ave., Phoenix, Ariz. 6.55
Mr. Winship, 715 N. 12th Ave., Phoenix, Ariz. ..... .75
Mr. Warren, 612 N. 5th Ave., Phoenix, Arizona 1.00
E. B. Walluk, 85 W. Willetta St., Phoenix, Arizona 7.20

Mrs. Hannah White, 1715 W. Van Buren St., Phoenix, Ariz. 1.50
Mr. T. B. Williams, 817 N. 4th Ave., Phoenix, Ariz. 12.95
Mrs. Weener, 817 W. McKinley St., Phoenix, Arizona 4.50
Mr. Weatherbee, 2126 W. Jefferson St., Phoenix, Ariz. 9.90
J. L. Walker, 649 N. 4th Ave., Phoenix, Arizona 36.54
Tom Weatherford, Contractor, Phoenix, Arizona 72.74
A. F. Waselewski Construction Co., Phoenix, Arizona 65.49
Dr. Wilkinson, 825 E. McDowell, Phoenix, Arizona 5.05
Mr. Wolfe, 1014 N. Central, Phoenix, Arizona 1.75
E. S. Walker, 503 E. Willetta St., Phoenix, Ariz. 4.10
D. A. Wagner, 302 E. Pierce St., Phoenix, Ariz. 6.35
Western Builders, Phoenix, Arizona 1.75
Mrs. John Webber, Phoenix, Arizona 1.85
T. B. Williams, Phoenix, Arizona 2.00
Mr. Yeager, 544 E. Lynwood St., Phoenix, Arizona 25.05
J. Zurite, 233 E. Jefferson St., Phoenix, Arizona 6.08

[99]

Schedule B.–3–D.

UNLIQUIDATED CLAIMS.

Backowitz Apartments, Phoenix, Arizona. Mechanic's lien filed and being foreclosed. Estimated 2,600.00

O. R. Bell, Phoenix, Arizona. Job 12th Ave. and Van Buren St. 149.66

O. R. Bell, Phoenix, Arizona. Job 23 W. Monroe St., Phoenix, Arizona 287.91

W. H. Brown, Contractor State Hospital for the Insane. Contract and extras, $7,270.05; credits, $4,080.00, balance assigned May, 7, 1929, to Standard Sanitary Mfg. Co., Phoenix, Arizona 3,190.05

James Barnes, Phoenix, Arizona, Latham Street job, assigned to Crane Company. 271.49

Cabel Job, Phoenix, Arizona, 7th & Desert Sts. Charges $190.60, credits $25.00; thinks another $25.00 payment made but not credited, about 140.60

City of Phoenix, New City Hall. Contract $23,233.85, credits $14,526.00, balance assigned to Standard Sanitary Mfg. Co., Phoenix, Arizona, on May 7, 1929.. 8,707.85

This job taken over by Southern Surety Company, bondsman for completion.

Eagan Construction Co., Phoenix, Arizona; deanery for Trinity Cathedral 238.90

Elliott Engineering Co. Contract on Washington School. Contract and extras $714.05; owes Elliott Engineering Com-

pany about $2,600.00 over and above this amount 00.00

Green & Hall, contractors, Phoenix, Arizona, Dan Campbell Job; Charges $1,597.55, credits $900.00, balance $697.55; $500.00 assigned to Crane Company, balance... 197.00

Green & Hall, Phoenix, Arizona; Old residence; extras 11.50

Green & Hall, Phoenix, Arizona, W. W. Knorpp residence; charged $3,107.98; credits $2,930.30; balance..... 177.68

Green & Hall, Phoenix, Arizona, Dowell Contract 254.00

Green & Hall, Phoenix, Arizona, E. J. Bennitt Residence. Balance due, estimated 1,968.86

Green & Hall, Phoenix, Arizona, Schwenker Residence. Contract $2,934.00, credits, $1,300.00; balance $1,634.00. Job taken over by Massachusetts Bonding Company for completion at cost of about $300.00; balance, about.....1,334.00 Balance assigned to Crane Company.

Harvey & Reed, Contractors Washington School. Charges 69.08

Litchfield School District, Litchfield School. Contract & Extras, $2,077.70; credits $2,020.00, balance 57.70

[100]

Schedule B.–3–D.

Unliquidated Claims—Continued.

Hagan & Farmer, Contractors, Marana Teachers College, Marana, Arizona, balance due about 100.00

Mesa Bank Building, Mesa, Arizona. Don't know. Looks like overpaid.

E. W. Michael, Phoenix, Arizona; balance due 135.50

H. A. Patterson, Contractor, Res. 355 E. Palm Lane 42.54

Wm. Pepper, Contractor, Lutheran Church; charges $594.50, credits $297.25; offset by what owes Pepper 00.00

Phoenix Union High School District, Phoenix, Arizona; Central Heating Plant; contract and extras $29,326.10; credits $25,819.00, balance assigned May 7, 1929, to Standard Sanitary Mfg. Co., Phoenix, Arizona 3,507.10

Job taken over by Massachusetts Bonding Company for completion.

Phoenix Union High School District, Phoenix, Arizona; Junior College Building; contract and extras $8,424.00; credits, $6,318.00, balance assigned to Standard Sanitary Mfg. Co., May 7, 1929 .....2,106.00

Job still uncompleted.

Phoenix Union High School District, Phoenix, Arizona; Library and class room building; contract and extras $18,-860.12; credits $9,450.00; balance as-

signed May 7, 1929, to Standard Sanitary Mfg. Co., Phoenix, Arizona 9,410.12

This job taken over by American Bonding Company for completion.

Joe Samardo, Phoenix, Arizona; balance due 60.00

Southern Prison Company, contract on city Hall 375.00

J. W. Tucker, Contractor, Phoenix, Arizona, Mel Fickas residence, about 100.00

Mr. Taylor, 2021 Elvarado St., Phoenix, Arizona 166.25

Yuma High School District, Yuma, Arizona; Contract $5,717.00; credits $2,997.08; This job taken over by Massachusetts Bonding Company for completion 00.00

[101]

SCHEDULE B. (4)

PROPERTY IN REVERSION, REMAINDER OR EXPECTANCY, INCLUDING PROPERTY HELD IN TRUST FOR THE DEBTOR, OR SUBJECT TO ANY POWER OR RIGHT TO DISPOSE OF OR TO CHARGE.

(N. B.—A particular description of each interest must be entered. If all, or any of the debtor's property has been conveyed by deed or assignment, or otherwise, for the benefit of creditors, the date of such deed should be stated, the name and address of the person to whom the property was conveyed, the amount realized from the proceeds thereof, and the disposal of the same, as far as it is known to the debtor.)

General Interest.	PARTICULAR DESCRIPTION	Supposed Value of My Interest
		Dollars Cents
Interest in land.	None.	
Personal Property.	None.	
Property in money, stock, shares, bonds, annuities, etc.	None.	
Rights and powers, legacies and bequests.	None.	
	Total.....	

		Amount realized from proceeds of property Conveyed
Property heretofore conveyed for the benefit of creditors.	See Schedule A–2—showing assignments of contracts.	
What portion of debtor's property has been conveyed by deed or assignment, or otherwise, for benefit of creditors; date of such deed, name and address of party to whom conveyed; amount realized therefrom, and disposal of same, so far as known to debtor.	None except as above stated.	
What sum or sums have been paid to counsel, and to whom, for services rendered or to be rendered in this bankruptcy.	None.	
	Total.....	

(Full sets of schedule blanks must be filed. If there are no items applicable to any particular blanks, such fact should be stated in said blank. Each schedule sheet must be signed.)—Rule 14.

LEO FRANCIS, Petitioner. [102]

SCHEDULE B. (5)

A particular statement of the property claimed as exempted from the operation of the Acts of Congress relating to Bankruptcy, giving each item of property and its valuation; and, if any portion of it is real estate, its location, description and present use.

Military uniform, arms and equipments.

Property claimed to be exempted by State laws; its valuation; whether real or personal; its description and present use; and reference given to the statute of the State creating the exemption.

N. B. — This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months, or the greater portion thereof, immediately preceding the filing of the petition.

	Valuation	
	Dollars	Cents
Wearing apparel and ornaments	50	00
1–Toledo power drive thread cutting machine	100	00
1 bench vice	25	00
1–36″ Stilson wrench	2	50
1–36″ chain tong	2	50
1 pipe cutter from 2½ to 4″	4	00
1–claw-hammer		35
1 ball peon-hammer		50
1 single jack-hammer		75
1 monkey-wrench		50
4 rock points	1	00
2 cold chisels		70
1–14″ Stilson wrench	1	00
1–10″ Stilson wrench		75
2–18″ Stilson wrenches	2	50
2–24″ Stilson wrenches	3	00
1 Trimo pipe cutter from ¼ to 2″	2	50
1–#1 A. Toledo stocks from 1 to 2″	8	00
1–#0 Toledo stocks from ⅜ to 1″	5	00
1–Toledo stocks from 2½ to 4″	15	00
1 pipe reamer	0	00
1 brace and bit		75
1 rod spud wrench	1	00
Total	427	30

(Full sets of schedule blanks must be filed. If there are no items applicable to any particular blanks, such fact should be stated in said blank. Each schedule sheet must be signed.)—Rule 14.

LEO FRANCIS, Petitioner. [103]

12

SCHEDULE B. (6)

BOOKS, PAPERS, DEEDS AND WRITINGS RELATING TO BANKRUPT'S BUSINESS AND ESTATE.

The following is a true list of all books, papers, deeds and writings relating to my trade, business, dealings, estate and effects, or any part thereof, which at the date of this petition, are in my possession or under my custody and control, or which are in the possession or custody of any person in trust for me or for my use, benefit or advantage; and also of all others which have been heretofore, at any time, in my possession, or under my custody or control, and which are now held by the parties whose names are hereinafter set forth, with the reason for their custody of the same.

Books Contract-book, accounts receivable book, cash-book, time book, etc., in possession of Receiver.

Deeds. None.

Papers. All in possession of Receiver.

(Full sets of schedule blanks must be filed. If there are no items applicable to any particular blanks, such fact should be stated in said blank. Each schedule sheet must be signed.)—Rule 14.

LEO FRANCIS, Petitioner. [104]

OATH TO SCHEDULE "B."

United States of America,
Federal District of Arizona,—ss.

In the Matter of Momsen-Dunnegan-Ryan Co., et al., Petitioners, vs. Phoenix Plumbing and Heating Company et al., Alleged Bankrupts. In Bankruptcy No. B.-522—Phoenix.

On this —— day of September, A. D. 1929, before me personally came Leo Francis, one of the persons mentioned in and who subscribed to the foregoing Schedule and who being by me first duly sworn, did declare the said Schedule to be a statement of all his estate, both real and personal, in accordance with the Acts of Congress relating to Bankruptcy.

LEO FRANCIS.

Subscribed and sworn to, before me, this 17th day of September, 1929.

[Seal] O. E. SCHUPP,
Notary Public.

My commission expires February 15, 1932. [105]

14

SUMMARY OF DEBTS AND ASSETS.

From the statements of the bankrupt in Schedules A and B.

		Dollars	Cents
Schedule A.	1. (1) Taxes and debts due the United States..	None	
	1. (2) Taxes due States, Counties, Districts and Municipalities	322	91
	1. (3) Wages	169	00
	1. (4) Other debts preferred by law.....		
Schedule A.	2. Secured claims	48,136	44
Schedule A.	3. Unsecured claims	21,943	24
Schedule A.	4. Notes and bills which ought to be paid by other parties thereto.....		
Schedule A	5. Accommodation paper		
	Schedule A. Total	70,571	59
Schedule B.	1. Real Estate		
Schedule B.	2. a Cash on hand		
	2. b Bills, promissory notes, and securities....		
	2. c Stock in trade	3,500	00
	2. d Household goods, etc.	50	00
	2. e Books, prints and pictures.....		
	2. f Horses, cows and other animals.....		
	2. g Carriages and other vehicles	400	00
	2. h Farming stock and implements.....		
	2. i Shipping and shares in vessels.....		
	2. k Machinery, tools, etc.	177	30
	2. l Patents, copyrights and trade-marks....		
	2. m Other personal property		

Schedule B.	3. a	Debts due on open accounts.....	3,724 24
	3. b	Stocks, negotiable bonds, etc.	
	3. c	Policies of insurance	00 00
	3. d	Unliquidated claims	35,658 79
	3. e	Deposits of money in banks and elsewhere	
Schedule B.	4.	Property in reversion, remainder, trust, etc.	
Schedule B.	5.	Property claimed to be exempt.....$427.30	
Schedule B.	6.	Books, deeds and papers	
		Schedule B, Total.....	43,510 33

(N. B.—This summary Blank must be filled out and properly footed.)

LEO FRANCIS, Petitioner. [106]

Back of Exhibit:

No. B.–522.

U. S. District Court.

Federal District of Arizona,

Phoenix Division.

In the Matter of Momsen-Dunnegan-Ryan Company, et al., Petitioning Creditors, vs. Phoenix Plumbing & Heating Company, et al. Alleged Bankrupts.

PETITION AND SCHEDULES.

O. E. SCHUPP,
Attorney for Bankrupt.
(P. O. Address)
507 Luhrs Bldg., Phoenix, Arizona.

Filed Sept. 18, 1929. C. R. McFall, Clerk United States District Court for the District of Arizona. By Archie L. Gee, Deputy Clerk.

Report of Special Master. Filed Feb. 18, 1930. C. R. McFall, Clerk United States District Court for the District of Arizona. By H. F. Schlittler, Deputy Clerk. [107]

B.–522.

PETITIONERS' EXHIBIT No. 8.
In Evidence.
AGREEMENT.

THIS AGREEMENT, made this 7th day of June, 1929, between Leo Francis, of Phoenix, Ari-

zona, hereinafter called "Employer," of the one part, and Cliff B. Fryberger, of Phoenix, Arizona, hereinafter called the "Manager," of the other part,

WITNESSETH:

(1) The employer shall employ the manager for the term of fifteen months from date hereof as manager of the employer's business as a dealer in plumbing and plumbing contractor, now carried on at No. 316 North 6th Avenue, in the city of Phoenix, Arizona, subject to the determination as hereinafter provided.

(2) The manager shall well and faithfully serve the employer in such capacity as aforesaid, and shall at all times devote his whole time, attention and energies to the management, superintendence and improvement of the said business to the utmost of his ability, and shall conduct said business for the protection of the creditors of the Phoenix Plumbing & Heating Company, owned by employer, and perform all such services, acts and things connected therewith as the employer shall from time to time direct, with the consent of the creditors of the Phoenix Plumbing & Heating Company, and as are of a kind properly belonging to the duties of a manager of such business.

(3) The manager shall not divulge any matters, relating to said business or to the employer or to any customer which may become known to the manager, to ~~the~~ any competitors by reason of his employment, or otherwise, save insofar as may be necessary to the interest of said business.

(4) The manager shall keep or cause to be kept all such books of accounts or other books as shall be needed for that purpose, and shall enter or cause to be entered therein the usual accounts or particulars of all goods and things bought and received and sold or delivered upon credit, or otherwise, in the course of said business and shall at all times [108] render to the employer and creditors accurate accounts and full statements of and concerning said business. Said books shall at all times be open to the inspection of the employer and his agents in that behalf.

(5) All moneys received by the employer, except such sum as shall be required to be paid to "petty cash" shall be deposited to the account of the Phoenix Plumbing & Heating Company in a local bank at Phoenix, Arizona, if possible on the date of receipt, and every payment in excess of $10.00 shall be made by check drawn on such account. The manager shall not draw, or accept, or make any bill of exchange or promissory note on behalf of the employer or otherwise pledge his credit except so far as he may have been thereto authorized by the employer.

(6) The employer shall pay to the manager a salary of $250.00 per month, semi-monthly, in installments of $125.00 each, on the 1st day of each month and the 15th day of each month; and at the expiration of the fifteen months, if the business of the Phoenix Plumbing & Heating Company is in a solvent condition, said manager to receive a third

interest in addition to the above salary, for his services.

(7) The manager shall only have authority to sign all checks and receive moneys due the Phoenix Plumbing & Heating Company, and the manager shall furnish a surety bond to the employer in the amount of $5,000.

IN WITNESS WHEREOF, the parties have hereunto set their hands, the day and year first hereinabove written.

LEO FRANCIS.
CLIFF B. FRYBERGER. [109]

State of Arizona,
County of Maricopa,—ss.

Before me, Caroline Helms, a notary public in and for said County and State, personally appeared Leo Francis and Cliff B. Fryberger, known to me to be the parties named in the within and foregoing instrument, and each for himself acknowledged to me that they executed the same for the purposes and considerations therein expresses.

[Seal] CAROLINE HELMS,
Notary Public.

My commission expires Sept. 18th, 1932.

The above agreement is approved by me this 7th day of June, 1929.

_____.

_____.

[110]

B.–522.

PETITIONERS' EXHIBIT No. 9.

In Evidence.

Cancelled Checks.

No. F–106. The Commercial National Bank, Phoenix, Ariz.

April 1, 1928.

Pay to the order of Walter Shayeb $205.00—Two Hundred no/100 Dollars.

PHOENIX PLUMBING & HEATING CO.
D. L. FRANCIS.

DLF.

Endorsed on back: WALTER SHAYEB.

No. F–75. The Commercial National Bank, Phoenix, Ariz.

May 10, 1929.

Pay to the order of Walter Shayeb $1015.00—One Thousand and Fifteen no/100 Dollars.

PHOENIX PLUMBING & HEATING CO.
D. L. FRANCIS.

PAUL E. GEHRES.

Endorsed on back: WALTER SHAYEB.
HOWARD O. WORKMAN.

[111]

B.–522.

PETITIONERS' EXHIBIT No. 10.

In Evidence.

Cancelled Checks.

No. 838. Phoenix Plumbing & Heating Co., 316 North Sixth Avenue, Phone 5065, Phoenix, Ariz.

July 30, 1928.

The Commercial National Bank, Phoenix, Arizona.
Pay to the order of Joe Thomas $712.00—Seven Hundred Twelve Dollars.

PHOENIX PLUMBING & HEATING CO.
By D. L. FRANCIS.

Endorsed on back: JOE THOMAS.
MAUD THOMAS.

No. 2383. Phoenix Plumbing & Heating Co., 316 North Sixth Avenue, Telephone 5065, Phoenix, Ariz.

4–12–1929.

The Commercial National Bank, Phoenix, Arizona.
Pay to the order of Joe Thomas $1000.00—One Thousand no/100 Dollars.

PHOENIX PLUMBING & HEATING CO.
By D. L. FRANCIS.

Endorsed on back: JOE THOMAS.

No. 2724. Phoenix Plumbing & Heating Co., 316 North Sixth Avenue, Phone 5065, Phoenix, Ariz.

5–22–1929.

The Commercial National Bank, Phoenix, Arizona.

Pay to the order of Joe Thomas $100.00—One Hundred no/100 Dollars.

PHOENIX PLUMBING & HEATING CO.
By D. L. FRANCIS.

PAUL E. GEHRES.

Endorsed on back: JOE THOMAS.

No. F–103. Phoenix Arizona.

5–16–1929.

The Commercial National Bank, Phoenix, Ariz.

Pay to the order of Joe Thomas $250.00—Two Hundred fifty no/100 Dollars.

PHOENIX PLUMBING & HEATING CO.
D. L. FRANCIS.

PAUL E. GEHRES.

Endorsed on back: ARIZONA GARMENT MFG. CO., 532 W. *E*ashington, Phoenix, Arizona.

No. F–105. The Commercial National Bank, Phoenix, Ariz.

5–24–1929.

Pay to the order of Joe Thomas $50.00—Fifty no/100 Dollars.

PHOENIX PLUMBING & HEATING CO.
D. L. FRANCIS.

PAUL E. GEHRES.

Endorsed on back: JOE THOMAS.

No. F–98. The Commercial National Bank, Phoenix, Ariz.

5–2–1929.

Pay to the order of Joe Thomas $125.00—One Hundred Twenty-five no/100 Dollars.

PHOENIX PLUMBING & HEATING CO.
D. L. FRANCIS.

PAUL E. GEHRES.

Endorsed on back: JOE THOMAS. [112]

B.–522.

PETITIONERS' EXHIBIT No. 11.

In Evidence.

Cancelled check.

No. 7–74. The Commercial National Bank, Phoenix, Ariz.

3/15 1929.

Pay to the order of M. Karam & Sons Merc. Co. $1100.00—Eleven Hundred no/100 Dollars.

PAUL E. GEHRES.

PHOENIX PLUMBING & HEATING CO.
D. L. FRANCIS.

Endorsed on back: Pay to the order of Sonora Bank & Trust Co., Nogales, Arizona. M. Karam & Sons Mercantile Co., For Deposit Only. [113]

No. 2724. Phoenix Plumbing & Heating Co., 316 North Sixth Avenue, Phone 5065, Phoenix, Ariz.

5–22–1929.

The Commercial National Bank, Phoenix, Arizona.

Pay to the order of Joe Thomas $100.00—One Hundred no/100 Dollars.

PHOENIX PLUMBING & HEATING CO.
By D. L. FRANCIS.

PAUL E. GEHRES.

Endorsed on back: JOE THOMAS.

No. F–103. Phoenix Arizona.

5–16–1929.

The Commercial National Bank, Phoenix, Ariz.

Pay to the order of Joe Thomas $250.00—Two Hundred fifty no/100 Dollars.

PHOENIX PLUMBING & HEATING CO.
D. L. FRANCIS.

PAUL E. GEHRES.

Endorsed on back: ARIZONA GARMENT MFG. CO., 532 W. *E*ashington, Phoenix, Arizona.

No. F–105. The Commercial National Bank, Phoenix, Ariz.

5–24–1929.

Pay to the order of Joe Thomas $50.00—Fifty no/100 Dollars.

PHOENIX PLUMBING & HEATING CO.
D. L. FRANCIS.

PAUL E. GEHRES.

Endorsed on back: JOE THOMAS.

No. F–98. The Commercial National Bank, Phoenix, Ariz.

5–2–1929.

Pay to the order of Joe Thomas $125.00—One Hundred Twenty-five no/100 Dollars.

PHOENIX PLUMBING & HEATING CO.
D. L. FRANCIS.

PAUL E. GEHRES.

Endorsed on back: JOE THOMAS. [112]

B.–522.

PETITIONERS' EXHIBIT No. 11.

In Evidence.

Cancelled check.

No. 7–74. The Commercial National Bank, Phoenix, Ariz.

3/15 1929.

Pay to the order of M. Karam & Sons Merc. Co. $1100.00—Eleven Hundred no/100 Dollars.

PAUL E. GEHRES.

PHOENIX PLUMBING & HEATING CO.
D. L. FRANCIS.

Endorsed on back: Pay to the order of Sonora Bank & Trust Co., Nogales, Arizona. M. Karam & Sons Mercantile Co., For Deposit Only. [113]

B.–522.

PETITIONERS' EXHIBIT No. 12.

In Evidence.

Cancelled checks.

No. 2645. Phoenix Plumbing & Heating Co., 316 North Sixth Avenue. Phone 5065. Phoenix, Ariz.

May 11, 1929.

Pay to the order of Arizona Garment Mfg. Co. $113.46—***113***46*** Dollars.

PHOENIX PLUMBING & HEATING CO.
By D. L. FRANCIS.

PAUL E. GEHRES.

THE COMMERCIAL NATIONAL BANK,
Phoenix, Arizona.

Endorsed on back: ARIZONA GARMENT MFG. CO., 532 W. Washington, Phoenix, Arizona.

No. 2611. Phoenix Plumbing & Heating Co., 316 North Sixth Avenue. Phone 5065. Phoenix, Ariz.

May 10, 1929.

Pay to the order of Arizona Garment Mfg. Co. $50.00—***50 Dol's***00 cts***Dollars.

PHOENIX PLUMBING & HEATING CO.
By D. L. FRANCIS.

PAUL E. GEHRES.

THE COMMERCIAL NATIONAL BANK,
Phoenix, Arizona.

Endorsed on back: ARIZONA GARMENT MFG. CO.

No. 2602. Phoenix Plumbing & Heating Co., 316 North Sixth Avenue. Phone 5065. Phoenix, Ariz.

May 8, 1929.

Pay to the order of Arizona Garment Mfg. Co. $170.00—***170 Dol's***00 cts***Dollars.

PHOENIX PLUMBING & HEATING CO.
By D. L. FRANCIS.

PAUL E. GEHRES.

THE COMMERCIAL NATIONAL BANK,
Phoenix, Arizona.

Endorsed on back: ARIZONA GARMENT MFG. CO. By B. [114]

B.–522.

Page #2,—PETITIONERS' EXHIBIT No. 12.

In Evidence.

Cancelled checks.

No. 2496. Phoenix Plumbing & Heating Co., 316 North Sixth Avenue. Phone 5065. Phoenix, Ariz.

4–27 1929.

Pay to the order of Arizona Garment Mfg. Co. $180.00—***180 Dol's***00 cts***Dollars.

PHOENIX PLUMBING & HEATING CO.
By D. L. FRANCIS.

PAUL E. GEHRES.
THE COMMERCIAL NATIONAL BANK,
of Phoenix.
Phoenix, Arizona.

Endorsed on back: ARIZONA GARMENT MFG. CO.

JOE THOMAS.

No. 2583. Phoenix Plumbing & Heating Co., 316 North Sixth Avenue. Phone 5065. Phoenix, Ariz.

May 4, 1929.

Pay to the order of Arizona Garment Mfg. Co. $98.52—***98 Dol's***52 cts***Dollars.

PHOENIX PLUMBING & HEATING CO.
By D. L. FRANCIS.

PAUL E. GEHRES.

THE COMMERCIAL NATIONAL BANK,
of Phoenix.
Phoenix, Arizona.

Endorsed on back: ARIZONA GARMENT MFG. CO., 532 W. Washington, Phoenix, Arizona. [115]

B–522.

PETITIONERS' EXHIBIT No. 13.

In Evidence.

Sheet No. ———

———————Name: Sunshine Plumbing.

———— ————Address: ————————

Old Balance	Date	Checks in Detail	Date Deposits	Date	New Balance
2,150.00	Sep 29	9.92–	Sep 26 2150.00	Sep 26	2,150.00*
2,140.08	Oct 3	13.50– 20.06–		Sep 29	2,140.08*
2,106.52	Oct 3	100.00–		Oct 3	2,106.52*
2,006.52	Oct 5	1,500.00–		Oct 3	2,006.52*
506.52	Oct 7	17.93– 10.00–		Oct 5	506.52*
478.59	Oct 8	47.30–		Oct 7	478.59*
431.29	Oct 10	4.20– 10.00–		Oct 8	431.29*
417.09	Oct 11	15.00– 10.00– 35.00–		Oct 10	417.09*

Old Balance	Date	Checks in Detail			Date	Deposits	Date	New Balance
357.09	Oct 13	6.00–					Oct 11	357.09*
351.09	Oct 14	38.40–	25.00–	25.00–	Oct 15	45.85	Oct 13	351.09*
262.69	Oct 15	115.00–					Oct 14	262.69*
193.54	Oct 17	5.00–					Oct 15	193.54*
188.54	Oct 17	50.00–					Oct 17	188.54*
138.54	Oct 19	10.00–					Oct 17	138.54*
128.54	Oct 22	3.59–					Oct 19	128.54*
124.95	Oct 26	35.00–					Oct 22	124.95*
89.95	May 11	89.95–					Oct 26	89.95*
							May 11	.00*

[116]

B.–522.

PETITIONERS' EXHIBIT No. 15.

In Evidence.

Face of Exhibit:

$65.00. 12–8, 1928.

Thirty days after date *W* promise to pay to the order of J. R. Fleming Sixty-five no/100 Dollars for value received with interest at the rate of —— per cent per annum from ——— and if the interest be not paid annually, to become as principal, and bear the same rate of interest. This note, is negotiable and payable without defalcation or discount and without any relief or benefit whatever from stay, valuation, appraisement, or homestead exemption laws.

PHOENIX PLBG. & HTG. CO.
D. FRANCIS.

Paid Jan. 12, 1929.
Phoenix National Bank.
No. ———. Due ———.

Back of Exhibit:

J. R. Fleming. $65.43

Face of Exhibit:

$65.00. 12–8, 1928.

Sixty days after date we promise to pay to the order of J. R. Fleming Sixty-five no/100 Dollars, for value received with interest at the rate of —— per cent per annum from ——— and if the interest be not paid annually, to become as principal, and bear the same rate of interest. This note is negotiable and payable without defalcation or discount and

without any relief or benefit whatever from stay, valuation, appraisement, or homestead exemption laws.

PHOENIX PLBG. & HTG. CO.
D. FRANCIS.

Paid 2/18/29. J. R. F.
No. ———. Due.
Back of Exhibit:
J. R. Fleming. [117]

B.–522.

PETITIONERS' EXHIBIT No. 17.

In Evidence.

11–29–29.

Letter Head.

BRUNSWICK–KROESCHELL COMPANY
4221 Diversey Ave.
Chicago, Ill.

July 5, 1929.

Phoenix Plumbing & Heating Company,
316 North Sixth Avenue,
Phoenix, Arizona.

Gentlemen:

Subject: Oil Burning Equipment Co. Assignment (File #D–10).

We received a wire from you on June 21st and have been waiting for the letter which you said would follow. We have not received such a letter from you, and inasmuch as you have not forwarded us your remittance for $985.00 which represents the amount owing the Oil Burning Equipment Com-

pany and which was assigned to us, we feel that we should take some legal steps toward the collection. This amount is due us and we expect you to pay it to us at an early date.

If you have not already done so, kindly wire us in reference to the amount due. Your prompt attention will be appreciated.

Yours very truly,
BRUNSWICK-KROESCHELL COMPANY,
By WALTER G. COBB,
Chief Accountant Kroeschell Plant.
WGC:LW. [118]

B.-522.

PETITIONERS' EXHIBIT No. 22.

In Evidence.

12-3-29.

No. 31031 C/B.

SIDNEY P. OSBORN and NERI OSBORN, Jr.,
Plaintiffs,

vs.

W. J. BACHOWITZ and ROSE BACHOWITZ, His Wife, VICTOR F. RODRIQUEZ, E. H. WHEAT, WALTER DUBREE, CLINTON CAMPBELL, LUTHER HILL, JAMES A. BOYD, O. M. MOORE, H. L. and A. J. CHRISTIAN, ALLISON STEEL MANUFACTURING COMPANY, a Corporation, PHOENIX BUILDERS' SUPPLY COMPANY, a Corporation, C. P. MUNGER

ROCK COMPANY, a Corporation, ARIZONA SASH AND DOOR COMPANY, a Corporation, and JOHN DOE and JANE DOE, & PHOENIX PLUMBING & HEATING CO.,

Defendants.

SUMMONS.

The State of Arizona to: W. J. Bachowitz and Rose Bachowitz, His Wife; Victor F. Rodriquez; E. H. Wheat; Walter Dubree; Clinton Campbell; Luther Hill; James A. Boyd; O. M. Moore; H. L. and A. J. Christian; Allison Steel Manufacturing Company, a Corporation; Phoenix Builders' Supply Cómpany, a Corporation; C. P. Munger Rock Company, a Corporation; Arizona Sash and Door Company, a Corporation; and John Doe and Jane Doe, Defendants, GREETING:

YOU ARE HEREBY SUMMONED AND REQUIRED to appear in an action brought against you by the above-named plaintiffs in the Superior Court of Maricopa County, State of Arizona and answer the Complaint therein filed with the Clerk of said Court, at Phoenix, in said County, within twenty days after the service upon you of this Summons, if served in this said County, or in all other cases within thirty days thereafter, the times above mentioned being exclusive of the day of service, or judgment by default will be taken against you.

Given under my hand and the seal of the Superior Court of Maricopa County, State of Arizona this 22d day of October, 1929.

(Seal) WALTER S. WILSON,
Clerk of the Superior Court.
By M. B. FITTS,
Deputy Clerk. [119]

Acceptance of Service 10–25–29.
W. J. T.

B.–522. Petitioner's Exhibit No. 14 for Identification.

B.–522

Petitioner's Exhibit No. 22

In Evidence.

12–3–29.

Back of Exhibit:

State of Arizona,
County of Maricopa,—ss.

I HEREBY CERTIFY that I received the within Summons on the —— day of ————, A. D. 1929, at the hour of —— M., and personally served the same on the —— day of —— A. D. 1929, ————, being the defendant — named in said Summons, by delivering to ————, County of Maricopa, a copy of said Summons, to which was attached a true copy of the complaint mentioned in said Summons.

Dated this —— day of ————, A. D. 1929.

————————,
Sheriff.

By ————————,
Deputy Sheriff.

Fees, Service .....$———
Copies .....$———
Travel ——— miles .....$———
Publication .....$———
Total .....$———

No. ——. In the Superior Court of Maricopa County, State of Arizona. Sidney P. Osborn, and Neri Osborn, Jr., Plaintiffs, vs. W. J. Bachowitz and Rose Bachowitz, His Wife, et al., Defendants. Summons. [120]

In the Superior Court of the County of Maricopa, in and for the State of Arizona.

No. 31,031–B.

SIDNEY P. OSBORN and NERI OSBORN, Jr.,
Plaintiffs,

vs.

W. J. BACHOWITZ, and ROSE BACHOWITZ, His Wife, VICTOR F. RODRIQUEZ, E. H. WHEAT, WALTER DUBREE, CLINTON CAMPBELL, LUTHER HILL, JAMES A. BOYD, O. M. MOORE, H. L. and A. J. CHRISTIAN, ALLISON STEEL MANUFACTURING COMPANY, a Corporation, PHOENIX BUILDERS' SUPPLY COM-

PANY, a Corporation, C. P. MUNGER ROCK COMPANY, a Corporation, ARIZONA SASH AND DOOR COMPANY, a Corporation, and JOHN DOE and JANE DOE,

Defendants.

COMPLAINT.

Come now the plaintiffs, Sidney P. Osborn and Neri Osborn, Jr., through their attorney, H. S. McCluskey, and for cause of action against defendants, complain and allege, as follows:

I.

That the plaintiffs, Sidney P. Osborn and Neri Osborn, Jr., and each of them, are residents of the city of Phoenix, County of Maricopa, State of Arizona.

That the defendants, W. J. Bachowitz and Rose Bachowitz, his wife, and each of them, are residents of the City of Phoenix, County of Maricopa, State of Arizona.

That the defendants, Victor F. Rodriquez, E. H. Wheat, Walter Dubree, Clinton Campbell, Luther Hill, James A. Boyd, O. M. Moore, H. L. and A. J. Christian, are all of them residents of the City of Phoenix, County of Maricopa, State of Arizona;

That the defendant, Allison Steel Manufacturing Company, is a corporation, duly incorporated and existing under and by virtue of the laws of Arizona, with its principal place of business in the city of

Phoenix, County of Maricopa, State of Arizona; [121]

That the defendant, Phoenix Builders Supply *Company, a* corporation duly incorporated and existing under and by virtue of the laws of Arizona, with its principal place of business in the City of Phoenix, County of Maricopa, State of Arizona; [122]

That the defendant, C. P. Munger Rock Company, is a corporation, duly incorporated and existing under and by virtue of the laws of Arizona, with its principal place of business in the City of Phoenix, County of Maricopa, State of Arizona;

That the defendant, Arizona Sash and Door Company, is a corporation, duly incorporated and existing under and by virtue of the laws of Arizona, with its principal place of business in the City of Phoenix, County of Maricopa, State of Arizona;

That John Doe and Jane Doe are unknown to the plaintiffs and such names are fi*ci*tious names and the plaintiffs pray to be allowed to insert the true names of said persons, corporations or partnerships, when discovered, with the same effect as if said names had been properly and correctly written herein at this time.

II.

That on or about the 1st day of February, 1928, the defendants, W. J. Bachowitz and Rose Bachowitz, his wife, became and were justly indebted to J. W. Sullivan, of Prescott, Yavapai County, State of Arizona, in the sum of Four Thousand Seven hundred ($4,700.00) Dollars, and being so indebted,

in consideration thereof, and for value received, the said defendants, W. J. Bachowitz and Rose Bachowitz, his wife, made, executed and delivered to the said J. W. Sullivan, a certain promissory note for the sum of Four Thousand Seven Hundred ($4,700.00) Dollars, with interest thereon at the rate of Seven (7) per cent per annum, as will more fully appear by the said instrument, ready to be produced in court, and by a copy of the same herewith filed and marked Exhibit "A" and made a part of this complaint;

That to secure the payment of the principal sum and interest above mentioned, the said defendants, W. J. Bachowitz [123] and Rose Bachowitz, his wife, by their deed, dated the 1st day of February, 1928, conveyed to J. W. Sullivan, in fee simple, the following described parcel of land, with the appurtenances, situated in the City of Phoenix, County of Maricopa, State of Arizona, to wit:

> Lot two (2) in Block six (6) East Evergreen Addition according to the map or plat thereof on file and of record in the office of the County recorder of Maricopa County, State of Arizona, in Book 3 of Maps at page 55 thereof;

and the deed to which is recorded in the office of the County Recorder of Maricopa County, State of Arizona, in Book of Mortgages No. 218 at page 173, subject, however, to a condition of defeasance upon the payment of the principal and interest aforesaid, according to the tenor and effect of the said instrument, which said mortgage was, on the day of its date, duly acknowledged by the said defend-

ants, W. J. Bachowitz and Rose Bachowitz, his wife, and on the 4th day of February, 1928, recorded in the office of the Recorder of the County of Maricopa, State of Arizona, at 9:09 o'clock in the forenoon of said day, in Book 209 of Mortgages, on pages 255 and 256, as, by the said mortgage and its accompanying certificates of acknowledgment and recording, ready to be produced in court, and by a copy thereof herewith filed and marked Exhibit "B," and made a part of this complaint, will more fully appear.

III.

That the plaintiffs herein aver that the said promissory note and mortgage were on the 6th day of October, 1929, and before the commencement of this action, duly assigned, transferred, delivered and endorsed to the plaintiffs herein for a valuable consideration, and which assignment of promissory note and mortgage on the day of its date, duly acknowledged, and afterwards on the 9th day of October, 1929, recorded in the office of the Recorder for the County of Maricopa, State of [124] Arizona, at 11:27 o'clock in the forenoon of said day in Book No. —— of —— on page ——; as by the said Assignment of Mortgage and its accompanying certificates of acknowledgment and recording, ready to be produced in court, and by a copy thereof herewith filed and marked Exhibit "C," and made a part of this complaint, will more fully appear.

IV.

That the defendants, W. J. Bachowitz and Rose Bachowitz, his wife, failed to comply with the con-

ditions of the said promissory note and mortgage by omitting to pay the sum of Four Thousand Seven Hundred ($4,700.00) Dollars, with interest thereon at the rate of seven (7) percent per annum, which by the terms of said note and mortgage became due and payable on or before the first day of November, 1928, the interest being payable at maturity; and that there is now justly due to the plaintiffs the sum of Four Thousand Seven Hundred ($4,700.00) Dollars principal with interest thereon in the amount of Two Hundred and Forty-six and 75/100 Dollars ($246.75) with interest from the first day of November, 1928, on the said Four Thousand Seven Hundred ($4,700.00) Dollars and the said Two Hundred and Forty-six and 75/100 Dollars ($246.-75), at the rate of ten (10) per cent per annum as was specifically covenanted and agreed upon in the said mortgage and note.

V.

That the defendants, J. W. Bachowitz and Rose Bachowitz, his wife, failed to comply with the conditions of the said mortgage by omitting to pay to the proper officers all taxes and assessments assessed upon the said property or upon or within described note and mortgage, when the same became due, and to deliver the receipts therefor to the mortgagee, his representative or assigns, as was duly required of them, so to do, in the said mortgage heretofore described. And the mortgagee, J. W. Sullivan, because of default of the said defendants to [125] pay the said taxes and assessments and in order to maintain his liens, was compelled to pay

state, county, school district and city taxes and street improvement assessments and the interest thereon, assessed upon the said property, as follows, to wit:

November 5, 1928,	state and county and school district taxes ..	$ 25.96
March 15, 1929,	City of Phoenix taxes..	15.25
March 15, 1929,	City of Phoenix taxes..	15.24
October 14, 1929,	Interest on street improvement assessment.	13.43
October 14, 1929,	Principal on street improvement assessment.	125.34
		$195.22

That plaintiffs in order to maintain their liens were compelled to pay state, county, school district and city taxes and interest and penalties and fees on delinquent taxes assessed upon said property covered by the said mortgage heretofore described, as follows, to wit:

October 11, 1929,	state and county taxes, school district taxes, interest, penalties and fees	28.46
October 14, 1929,	city of Phoenix taxes	43.82
October 21, 1929,	state, county and school district taxes	95.89
		$168.17

And on the 11th day of October, 1929, to pay to the Superintendent of Streets, of the City of Phoenix, Three Hundred and Sixty-four and 94/100 ($364.94) dollars in order to redeem the said property, which had been sold to the City of Phoenix for

non-payment of principal and interest, advertising and penalty of assessment issued to represent the cost of improvements on Portland Street from the east line of Central Avenue to the west line of Seventh Street, in the said city, as by the receipts therefor, ready to be produced in court, and by copies of the same herewith filed and marked Exhibit "D," Exhibit "E," Exhibit "F," Exhibit "G," Exhibit "H," Exhibit "I" and Exhibit "J" and made a part of this complaint, will more fully appear; and that in addition to the sums mentioned in paragraph IV hereof there is due to the plaintiffs, from the defendants, the sum of Seven Hundred and twenty-eight and 33/100 ($728.33) dollars, with interest thereon at the rate of six per cent per annum upon the several aforementioned amounts from the date of [126] the payment thereof until paid.

VI.

That in the said note and mortgage it was expressly agreed that in case of the foreclosure of said note and mortgage by proceedings in court the said defendants, J. W. Bachowitz and Rose Bachowitz, his wife, agreed to pay ten per cent additional on the amount found due thereunder and plaintiffs claim that by the filing of this complaint under this clause in said note and mortgage there is now due to plaintiffs, for attorney's fees, Four Hundred and Ninety-four and 68/100 ($494.68) dollars, in addition to the sums heretofore mentioned in paragraphs IV and V of this complaint.

VII.

That no other action has been brought to recover

any part of the mortgage debt and that no part of the said mortgage debt has been collected.

VIII.

Plaintiffs further represent and charge that the said premises described in said mortgage are meager and scant security for the said sum of Four Thousand Seven Hundred ($4,700.00) dollars and interest mentioned in the said note, deed and mortgage and the other amounts due these plaintiffs.

IX.

That plaintiffs allege and state on information and belief that Victor F. Rodriquez, E. H. Wheat, Walter Dubree, Clinton Campbell, Luther Hill, James A. Boyd, O. M. Moore, H. L. and A. J. Christian, Allison Steel Manufacturing Company, a corporation, Phoenix Builders' Supply Company, a corporation, C. P. Munger Rock Company, a corporation, Arizona Sash and Door Company, a corporation, and John Doe and Jane Doe have or claim to have some interest in the said mortgaged premises, or some part thereof, as purchasers, mortgagees, judgment creditors, and/or liens for labor and materials, or otherwise, which [127] interest, or liens, if any, they have accrued subsequently to the lien of the said mortgage of the plaintiffs and the same are subject hereto: The plaintiffs, therefore, demand that the defendants and all persons claiming under them subsequent to the commencement of this action may be barred and foreclosed of all right, claim, lien and equity of redemption in said mortgaged premises, or any part thereof, that

the said premises, or so much thereof as may be sufficient to raise the amount due to the plaintiffs for principal, interest and interest thereon, payment of taxes, interest, fees, penalties and assessments for improvements and interest thereon and costs, and which may be sold separately without material injury to the parties interested, may be decreed to be sold according to law; that out of the moneys arising from the sale thereof the plaintiffs may be paid the amounts due on the said promissory note and mortgage, with interest, at the rate of ten per cent per annum to the time of such payments, and for reimbursement for the taxes, interest, penalties and fees and assessments for improvements with the legal rate of interest thereon from the date of the payment of the same to the time of such payment and for attorney's fees, costs and expenses of this action so far as the amount of such moneys properly applicable thereto will pay the same; and that the defendants, W. J. Bachowitz and Rose Bachowitz, his wife, may be adjudged to pay any deficiency which may remain after applying all of said moneys so applicable thereto; and that the plaintiffs may have such other relief, or both, in the premises as shall be just and equitable.

H. S. McCLUSKEY,

Attorney for Plaintiffs, 407 Ellis Building, Phoenix, Arizona.

SIDNEY P. OSBORN.

NERI OSBORN, Jr. [128]

State of Arizona,
County of Maricopa,—ss.

Sidney P. Osborn and Neri Osborn, Jr., being first duly sworn, each for himself and not one for the other, deposes and says that he is the person mentioned in, and who subscribed to the foregoing complaint, as a plaintiff therein, that he has read the complaint, and believes the contents thereof to be true of his own knowledge, except as to those matters and things stated upon information and belief, and as to those he believes it to be true.

SIDNEY P. OSBORN.
NERI OSBORN, Jr.

Subscribed and sworn to before me this 21 day of October, 1929.

[Seal] H. S. McCLUSKEY,
Notary Public.

My commission expires Aug. 29, 1933. [129]

EXHIBIT "J."

No. 200.

CERTIFICATE OF SALE OF PROPERTY.

Sold for the non-payment of Principal and Interest, Advertising and Penalty of Assessment issued to represent the cost of improvement of PORTLAND STREET from the East line of Central Avenue to the West line of Seventh Street in the City of Phoenix, County of Maricopa, State of Arizona, Bond Series No. 3.

This instrument is to certify that on the 31st day of August, 1929, at the hour of 10:04 A. M., of said day, under and by virtue of the authority vested in me by Chapter 144 of the Session Laws of the State of Arizona of 1919, and amendments thereto, relating to the sale of property for non-payment either of the principal or of the interest, penalty, advertising or cost accruing account of the assessments for the improvement of Streets I, B. E. GILPIN, as Deputy Superintendent of Streets of the City of Phoenix, sold to City of Phoenix the following described lot, piece or parcel of land, situate, lying and being in the City of Phoenix, County of Maricopa, State of Arizona, and more particularly described as follows, to-wit: Lot 2, Block 6, East Evergreen for the sum of three hundred forty-seven and 56/100 ($347.56) Dollars, which said amount was paid by the said City of Phoenix for said property.

That the said City of Phoenix was the one who was willing to take the least quantity of said lot, piece or parcel of land at said sale and pay amound due and unpaid upon that certain Assessment No. 26 Bond Series No. 3, issued to represent the assessment upon Lot 2, Block 6, East Evergreen for the improvement of PORTLAND STREET from the East line of Central Avenue to the West line of Seventh Street together with costs; the name of the owner of the property so sold, as given on the record of the assessment is unknown.

That the property herein described was sold by me for the said sum of three hundred forty-seven

and 56/100 ($347.56) Dollars, that sum being the total amount of the principal and interest together with penalty, advertising and cost due and unpaid upon the said assessment, together with costs, and the items of which are as follows, to-wit:

Amount of unpaid principal of Assessment..	$335.74
Amount of unpaid interest on Assessment...	10.07
Penalty	.50
Advertising	1.25
Certificate of Sale	
Costs	
	$347.56

The above named purchaser will be entitled to a deed for the above described property on the 31st day of August 1930, upon giving notice and application therefor as provided by Chapter 144 of the Session Law of the State of Arizona of 1919, and amendments thereto, unless sooner redeemed, according to said Act.

Dated and filed in the office of the Superintendent of Streets of the City of Phoenix, this 31st day of August, 1929, the same being the date of the sale.

B. E. GILPIN,
Deputy Superintendent of Streets.

Release on redemption in full dated October 11th, 1929, by Sidney P. Osborn for the sum of $364.94.

W. J. JAMIESON,
Superintendent of Streets. [130]

EXHIBIT "A."

$4700. Esc. 16179 J. B. M./W.

Phoenix, Arizona. February 1st, 1928.

On or before November 1st, 1928 for value received, we, or either of us promise to pay to J. W. Sullivan, or order, at —— the sum of Four Thousand Seven Hundred and No/100 Dollars, with interest thereon from February 1st, 1928 to Maturity of this note, at the rate of seven percent per annum, payable at maturity.

Should the interest as above not be paid when due, it shall thereafter bear interest at ten percent per annum until paid.

Should the principal hereof not be paid in full at maturity, it shall thereafter bear interest at ten percent per annum until paid. Principal and interest payable in lawful money of the United States of America.

Should suit be brought to recover on this note, we promise to pay as attorney's fees ten percent additional on the amount found due hereunder.

This note is secured by a mortgage upon real property.

W. J. BACHOWITZ,
ROSE BACHOWITZ,
By Her Attorney-in-fact.

Prescott, July 24, 1928.

I am sending this note to my attorneys, Baker and Whitney, Phoenix by their request to be held by

them for me pending a certain lien on my property.

J. W. SULLIVAN. [131]

EXHIBIT "B."

MORTGAGE.

KNOW ALL MEN, That W. J. Bachowetz and Rose Bachowetz, his wife, of Maricopa County, Arizona, hereinafter referred to as the Mortgagors, in consideration of Four Thousand Seven Hundred and No/100 Dollars, in hand paid by J. W. Sullivan hereinafter referred to as the Mortgagee the receipt of which is hereby acknowledged, do hereby grant, bargain, sell and convey to the Mortgagee his heirs and assigns forever, the following real estate, lying and being in the County of Maricopa, State of Arizona, known and described as

> Lot 2, Block 6, East Evergreen, an Addition to the City of Phoenix, according to the plat of record in the office of the County Recorder of Maricopa County, Arizona, in Book 3 of Maps, page 55 thereof;

TO HAVE AND TO HOLD the above described premises together with all the privileges and appurtenances thereunto belonging unto the mortgagee, his heirs, executors, administrators or assigns forever. And the mortgagors hereby covenant that they are well and truly seized of a good and perfect title to the premises above conveyed in the law, in fee simple, and have good right and lawful

authority to convey the same, and that the title so conveyed is clear, free and unincumbered and that they will forever warrant and defend the same to the mortgagee against all claims whatsoever.

PROVIDED ALWAYS, and these presents are upon this express condition that if the mortgagors shall pay to the mortgagee the just and full sum of Four Thousand Seven Hundred and No/100 Dollars, with interest thereon, according to the terms and conditions of one certain promissory note bearing even date herewith, due on or before November 1st, 1928, with interest thereon at 7% per annum, payable at maturity, and made and [132] executed by Mortgagors herein and payable to the order of the mortgagee and shall moreover pay to the proper officers all taxes and assessments, general or special, which shall be levied or assessed upon said real estate on or before the date when such taxes or assessments shall have become delinquent, and insure and keep insured the buildings on said premises against loss or damage by fire, in the sum of ..... Dollars in insurance companies to be selected by the mortgagee, and the policies of insurance assigned or made payable to the said mortgagee, as ..... interests may appear, until payment in full of said promissory note, and interest thereon, then these presents shall be null and void. In case of the non-payment of any sum of money (either of principal, interest or taxes) at the time or times when the same shall become due, or failure to insure said buildings according to the conditions of these presents, then the mortgagee may

pay same and add the amount so paid to the sum secured by this mortgage and in any such case, or in case of the failure on the part of the mortgagors to keep or perform any other agreement, stipulation or condition herein contained, or contained in the note above described, the whole amount of the said principal sum shall at the option of the mortgagee be deemed to have become due, and the same with interest thereon at the rate of ten (10) per cent per annum from the date of exercising said option, shall thereupon be collectible in a suit at law, or by foreclosure of this mortgage, in the same manner as if the whole of said principal sum had been made payable at the time when any such failure shall occur as aforesaid.

And the mortgagors do further covenant and agree to keep the mortgaged property in good condition and not to permit any waste or deterioration thereof, and in case complaint is filed for a foreclosure of this mortgage, the mortgagee shall [133] be entitled to the appointment of a Receiver without bond to take possession of the mortgaged premises and collect the rents and profits thereof pending foreclosure proceedings and up to the time of redemption or issuance of sheriff's deed, and in case of such foreclosure the mortgagors will pay to the mortgagee in addition to the taxable costs of the foreclosure suit ten percent (10%) as attorney's fees, on the amount found due, together with a reasonable fee for title search made in preparation and conduct of such suit, which shall be a lien on said premises and secured by this mortgage, and in

case of settlement after suit is brought, but before trial, the mortgagors agree to pay one-half of the above attorney's fees as well as all payments that the mortgagee may be obliged to make for his security.

The covenants herein contained shall extend to and be binding upon the heirs, executors, administrators, successors and assigns of the respective parties hereto.

IN WITNESS WHEREOF, The mortgagors have hereunto set their hands this 1st day of February, A. D. 1928.

W. J. BACHOWETZ. (Seal)
ROSE BACHOWETZ. (Seal)
By W. J. BACHOWETZ, (Seal)
Attorney-in-fact. (Seal)

Signed and sealed in the presence of

_____.

State of Arizona,
County of Maricopa,—ss.

Before me, J. J. Barkley, a Notary Public in and for the County of Maricopa, State of Arizona, on this day personally appeared W. J. Bachowetz, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 1st day of February, A. D. 1928.

[Seal] J. J. BARKLEY,
Notary Public.

My commission expires July 14, 1930. [134]

State of Arizona,
County of Maricopa,—ss.

Before me, J. J. Barkley, a Notary Public in and for said County, State of Arizona, on this day personally appeared W. J. Bachowetz, known to me to be the person whose name is subscribed to the foregoing instrument as the attorney-in-fact of Rose Bachowetz, and acknowledged to me that he subscribed the name of the said Rose Bachowetz thereto as principal and his own name of attorney-in-fact, and as such attorney-in-fact he executed said instrument for the purpose and consideration therein expressed.

Witness my hand and seal of office this 1st day of February, A. D. 1928.

[Seal] J. J. BARKLEY,
Notary Public.

My commission expires July 14, 1930.

Filed and recorded at request of J. W. Sullivan, Feb. 4, 1928, at 9:09 A. M.

W. H. LINVILLE,
County Recorder,
By Addie F. Mauzy,
Deputy.

#3663.

State of Arizona,
County of Maricopa,—ss.

I, J. K. Ward, County Recorder in and for the County and State aforesaid, hereby certify that I have compared the foregoing copy with the record

of Mortgage from W. J. Bachowetz and Rose Bachowetz, his wife, to J. W. Sullivan, filed and recorded in my office on the 4th day of February, 1928, in Book No. 209 of Mortgages, at Pages 255–256, and that the same is a full, true and correct copy of such record and of the whole thereof.

Witness my hand and seal of office, this 21st day of October, A. D. 1929.

[Seal] J. K. WARD,
County Recorder.
By Roger G. Laveen,
Deputy. [135]

EXHIBIT "C."

ASSIGNMENT OF MORTGAGE.

KNOW ALL MEN BY THESE PRESENTS: That J. W. Sullivan, of Prescott, Arizona, the party of the first part, for and in consideration of the sum of Ten Dollars to him in hand paid by Sidney P. Osborn and Neri Osborn, Jr., the parties of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, assign, transfer and set over unto the said parties of the second part, a certain Indenture of Mortgage bearing date the First day of February, one thousand nine hundred twenty-eight, made and executed by W. J. Bachowitz and Rose Bachowitz, his wife to J. W. Sullivan, which said mortgage was recorded on the 4th day of February, 1928, in Book 209 of Mortgages, pages 255–256, in the office of the County Recorder of Maricopa County, Arizona.

Together with the note therein described, and the

money dye and to become due thereon, with the interest.

And the said party of the first part does hereby make, constitute and appoint the said parties of the second part his true and lawful attorney, irrevocable, in his name, or otherwise, but at the proper costs and charges of the said parties of the second part, to have, use and take all the lawful ways and means for the recovery of the said money and interest; and in case of a payment to discharge the same as fully as the said party of the first part might or could do if these presents were not made.

IN WITNESS WHEREOF, said party of the first part has hereunto set his hand this 8 day of October, A. D. 1929.

J. W. SULLIVAN,

Signed and delivered in the presence of

H. R. WOOD. [136]

EXHIBIT "D."

No. 17729

33

RECEIPT FOR TAXES FOR THE YEAR 1928.

Maricopa County, Arizona.

First Installment:

(Due Sept. 3, 1928.

(Delinquent Nov. 5, 1928.

Second Installment:

(Due March 4, 1929.

(Delinquent May 6, 1929.

Compare at once with description of your property and see that it is correct.

Assessed to J. W. Sullivan, Phoenix, Arizona,

Nov. 5, 1928, in payment as shown of taxes for the year 1928 levied against the property described here on, as indicated by the assessment rolls of Maricopa County.

Description	Lot or sec.	Block or acres	Valuations Real Estate	State and County Property Tax
E. Evergreen	2	6	145	32.40

School Bond Tax Dist. No. 1	Total Tax	Delinquent Tax
19.53	$51.93	$25.96

(Paid Stamp) Paid.

JOHN D. CALHOUN,
County Treas.
By R. E.
RUTH EDWARDS.

Paid by
J. W. SULLIVAN. [137]

EXHIBIT "E."

Office of City Assessor and Ex-officio City Collector of the City of Phoenix, Maricopa County, Arizona.

Phoenix, Arizona, 10/14/29.
No. 208.

The City Tax for the fiscal year 1928–1929, on the following described property, the same being assessed to W. J. & Rose Bachowitz, is as follows:

	Tax
E. Evergreen, Lot 2, Block 6, Real Est. Valuations 1930	$30.49
1st Inst. 15.25 & Pen. 2.28 paid 3/15/29 Rec. 24248.	
2nd Inst. 15.24 paid 3/15/29 Rec. 711.2	

LANNAS S. HENDERSON,
City Assessor and Ex-Officio City Collector.
B. [138]

EXHIBIT "F."

This is to certify that the interest due June 1st, 1928, in the amount of $13.43 and interest and principal due Dec. 1, 1928, in the amount of $125.34 was paid at this office by J. W. Sullivan, on Lot 2, Block 6, East Evergreen Addition to the City of Phoenix, Series #3, Assm. 26.

Signed

_____,

Superintendent of Streets,
By M. B. HARTLINE. [139]

EXHIBIT "G."

No. 5531.

RECEIPT FOR TAXES FOR THE YEAR '28,
Maricopa County, Arizona.

Assessed to J. W. Sullivan, Phoenix, Arizona, October 11, 1929, in payment as shown of taxes levied against property described hereon, as indicated by the assessment-rolls of Maricopa County.

Description	Lot	Block	Valuations Real Estate	State and County Prop. Tax	Schl. Tax Dist. No. 1	Total Tax
East Evergreen	2	6	1415	32.40	19.53	51.93

JOHN B. CALHOUN,
Tax Collector.
By GORDON OSBORN,
Deputy.

Paid by
SIDNEY P. OSBORN,
210 First Natl. Bk.,
Phoenix, Arizona.

October 11, 1929.
Second Installment
Paid on this tax for year shown.

Delinquent tax	25.97
Line fee	.15
Interest	1.30
Penalty	1.04
Total	28.46
Paid	28.46

[140]

EXHIBIT "H."

CITY OF PHOENIX, ARIZONA.

CURRENT TAX RECEIPT No. 63.

W. J. & Rose Bachowitz
By J. W. Sullivan.

Dated October 14, 1929.

City Taxes for the Fiscal year 1929–1930.

Addition	Lots	Block	Land	Improvements	Total	Amt. of taxes
E. Evergreen	2	6	3955	3000	6955	87.63
				Paid first half		43.82
				Bal. due		43.81

Received payment
LANNAS S. HENDERSON,
City Assessor and Ex-officio City Collector.
KAY ROBINSON,
Deputy. [141]

EXHIBIT "I."

No. 665
Vol. 2

STATE AND COUNTY TAX RECEIPT—1929.
Maricopa County, Arizona.

John D. Calhoun, County Treasurer and Ex-officio Tax Collector.

Paid by Sidney P. Osborn,
210 First Natl. Bk. Bldg.

Description	Lot	Block	Valuations Rl. Est.	Imp.	State & Co. Property Tax	Schl. Bond Tax Dist. No. 1	Total Tax
E. Evergreen	2	6	1555	3000	128.91	62.86	191.77
				First Installment		Second Installment	
				95.89		95.88	

Assessed to
W. J. & ROSE BACHOWITZ

Paid by
SIDNEY P. OSBORN.

Paid Stamp of John D. Calhoun, County Treas.

Dated Oct. 21, 1929. [142]

B.–522.

PETITIONERS' EXHIBIT No. 23.

In Evidence.

12–3–29.

In the Superior Court of the County of Maricopa, State of Arizona.

No. 31031–C.

SIDNEY P. OSBORN and NERI OSBORN, Jr., Plaintiffs,

vs.

W. J. BACHOWETZ and ROSE BACHOWETZ, His Wife; VICTOR F. RODRIGUEZ; E. H. WHEAT; PHOENIX BUILDERS' SUPPLY COMPANY, a Corporation; ALLISON STEEL MANUFACTURING COMPANY, a Corporation; CLINTON CAMPBELL, Personally, and as Trustee, and LENA CAMPBELL, His Wife; C. P. MUNGER ROCK COMPANY, a Corporation; WALTER DUBREE; H. L. CHRISTIAN; A. J. CHRISTIAN; D. L. FRANCIS, LYON FRANCIS and LEO FRANCIS, Doing Business Under the Firm Name and Style of PHOENIX PLUMBING and HEATING COMPANY; LUTHER HILL; JAMES A. BOYD; O. M. MOORE; ARIZONA SASH-DOOR & GLASS COM-

PANY, a Corporation; WALTER J. THALHEIMER, Receiver for PHOENIX PLUMBING and HEATING COMPANY,
Defendants.

AMENDED COMPLAINT.

Comes now the plaintiffs by their attorneys and for cause of action against the defendants complain and allege:

I.

That the plaintiffs and each of them are residents of Maricopa County, Arizona; that the defendants W. J. Bachowetz and Rose Bachowetz, his wife, Victor F. Rodriquez, E. H. Wheat, Walter Durbree, Clinton Campbell and Lena Compbell, his wife, O. M. Moore, H. L. Christian and A. J. Christian, are each and all, plaintiffs are informed and believe, residents of Maricopa County, Arizona; that the defendants C. P. Munger Rock Company, Arizona Sash-Door & Glass Company, Allison Steel Manufacturing Company and Phoenix Builders' Supply Company, are corporations organized and existing under and by virtue of the laws of the [143] State of Arizona, and doing business in Maricopa County therein; that the defendants Luther Hill and James A. Boyd, plaintiffs are informed and believe, are each of them nonresidents of the State of Arizona, and the place of residence of each of said defendants is unknown to these plaintiffs; that the defendants D. L. Francis, Lyon Francis and Leo Francis, doing business under the name and

style of Phoenix Plumbing and Heating Company, plaintiffs are informed and believe, are residents of Maricopa County, Arizona; that Walter J. Thalheimer, Receiver for Phoenix Plumbing and Heating Company, is a resident of Maricopa County, Arizona.

II.

That on or about the 1st day of February, 1928, at Phoenix, Maricopa County, Arizona, the defendants W. J. Bachowetz and Rose Bachowetz, his wife, made, executed and delivered to J. W. Sullivan in said Phoenix, Maricopa County, Arizona, their promissory note in writing for the sum of Forty-seven Hundred ($4700.00) Dollars, with interest and attorneys' fees as therein provided, which said note is in words and figures as follows, to wit:

$4700.00. Esc. 16179. J.B.M./W.

Phoenix, Arizona, February 1st, 1928.

On or before November 1st, 1928, for value received, we, or either of us promise to pay to J. W. Sullivan, or order, at ——— the sum of Four Thousand Seven Hundred and no/100 Dollars, with interest thereon from February 1st, 1928, to maturity of this note, at the rate of seven per cent per annum, payable at maturity.

Should the interest as above not be paid when due, it shall thereafter bear interest at ten per cent per annum until paid.

Should the principal hereof not be paid in full at maturity, it shall thereafter bear interest at ten per cent per annum until paid. Principal and in-

terest payable in lawful money of the United States of America.

Should suit be brought to recover on this note, we promise to pay as attorney's fees ten per cent additional on the amount found due hereunder.

This note is secured by a mortgage upon real property.

W. J. BACHOWETZ.
ROSE BACHOWETZ.
By Her Attorney-in-fact. [144]

That said note contains the following writing on the back thereof:

Prescott, July 24, 1928.

I am sending this note to my attorneys, Baker and Whitney, Phoenix by their request to be held by them for me pending a certain lien on my property.

J. W. SULLIVAN.

III.

That in order to secure the payment of the principal sum of said promissory note the interest thereon and attorneys' fees as therein mentioned and provided said defendants W. J. Bachowetz and Rose Bachowetz, his wife, did execute and deliver to said J. W. Sullivan at Phoenix, Maricopa County, Arizona, their certain real estate mortgage bearing date the 1st day of February, 1928, which said mortgage is in words and figures as follows, to wit: [145]

"MORTGAGE.

"KNOW ALL MEN, That W. J. Bachowetz and

Rose Bachowetz, his wife, of Maricopa County, Arizona, hereinafter referred to as the Mortgagors, in consideration of Four Thousand Seven Hundred and No/100 Dollars, in hand paid by J. W. Sullivan hereinafter referred to as the Mortgagee the receipt of which is hereby acknowledged, do hereby grant, bargain, sell and convey to the Mortgagee his heirs and assigns forever, the following real estate, lying and being in the County of Maricopa, State of Arizona, known and described as

"Lot 2, Block 6, East Evergreen, an Addition to the City of Phoenix, according to the plat of record in the office of the County Recorder of Maricopa County, Arizona, in Book 3 of Maps, page 55 thereof;

"TO HAVE AND TO HOLD the above described premises together with all the privileges and appurtenances thereunto belonging unto the mortgagee, his heirs, executors, administrators or assigns forever. And the mortgagors hereby covenant that they are well and truly seized of a good and perfect title to the premises above conveyed in the law, in fee simple, and have good right and lawful authority to convey the same, and that the title so conveyed is clear, free and unincumbered and that they will forever warrant and defend the same to the mortgagee against all claims whatsoever.

"PROVIDED ALWAYS, and these presents are upon this express condition, that if the mortgagors shall pay to the mortgagee the just and full sum of Four Thousand Seven Hundred and No/100

Dollars, with interest thereon, according to the terms and conditions of one certain promissory note bearing even date herewith, due on or before November 1st, 1928, with interest thereon at 7% per annum, payable at maturity, and made and executed by Mortgagors herein and payable to the order of the mortgagee and shall moreover pay to the proper officers all taxes and assessments, general or special, which shall be levied or assessed upon said real estate on or before the date when such taxes or assessments shall have become delinquent, and insure and keep insured the buildings on said premises against loss or damage by fire, in the sum of ..... Dollars in insurance companies to be selected by the mortgagee, and the policies of insurance assigned or made payable to the said mortgagee, as ..... interests may appear, until payment in full of said promissory note, and interest thereon, then these presents shall be null and void. In case of the non-payment of any sum of money (either principal, interest or taxes) at the time or times when the same shall become due, or failure to insure said buildings according to the conditions of these presents, then the mortgagee may pay same and add the amount so paid to the sum secured, by this mortgage and in any such case, or in case of the failure on the part of the mortgagors to keep or perform any other agreement, stipulation or condition herein contained or contained in the note above described, the whole amount of the said principal sum shall at the option of the mortgagee be deemed to have become due, and

the same with interest thereon at the rate of ten (10) per cent per annum from the date of exercising said option, shall thereupon be collectible in a suit at law, or by foreclosure of this mortgage, in the same manner as if the whole of said principal sum had been made payable at the time when any such failure shall occur as aforesaid.

"And the mortgagors do further covenant and agree to keep the mortgaged property in good condition and not to permit any [146] waste or deterioration thereof, and in case complaint is filed for a foreclosure of this mortgage, the mortgagee shall be entitled to the appointment of a Receiver without bond to take possession of the mortgaged premises and collect the rents and profits thereof pending foreclosure proceedings and up to the time of redemption or issuance of sheriff's deed, and in case of such foreclosure the mortgagors will pay to the mortgagee in addition to the taxable costs of the foreclosure suit ten per cent (10%) as attorney's fees, on the amount found due, together with a reasonable fee for title search made in preparation and conduct of such suit, which shall be a lien on said premises and secured by this mortgage, and in case of settlement after suit is brought, but before trial, the mortgagors agree to pay one-half of the above attorney's fees as well as all payments that the mortgagee may be obliged to make for his security.

"The covenants herein contained shall extend to and be binding upon the heirs, executors, administrators, successors and assigns of the respective parties hereto.

"IN WITNESS WHEREOF, the mortgagors have hereunto set their hands this 1st day of February, A. D. 1928.

"W. J. BACHOWETZ. (Seal)
"ROSE BACHOWETZ. (Seal)
"By W. J. BACHOWETZ, (Seal)
"Attorney-in-fact.

"Signed and sealed in presence of

_____.

"State of Arizona,
"County of Maricopa,—ss.

"Before me, J. J. Barkley, a Notary Public in and for the County of Maricopa, State of Arizona, on this day personally appeared W. J. Bachowetz known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

"Given under my hand and seal of office this 1st day of February, A. D. 1928.

"[Seal] J. J. BARKLEY.

"My commission expires July 14, 1930.

"State of Arizona,
"County of Maricopa,—ss.

"Before me, J. J. Barkley, a Notary Public in and for said County, State of Arizona, on this day personally appeared W. J. Bachowetz known to me to be the person whose name is subscribed to the foregoing instrument as the Attorney in Fact of Rose Bachowetz, and acknowledged to me that he

subscribed the name of the said Rose Bachowetz thereto as principal and his own name of Attorney in Fact, and as such Attorney in Fact he executed said instrument for the purpose and consideration therein expressed.

"Witness my hand and seal of office this 1st day of February, A. D. 1928.

"[Seal] J. J. BARKLEY,

"Notary Public.

"My commission expires July 14, 1930." [147] and which said mortgage was duly acknowledged and certified so as to entitle it to be recorded and the same was on, to wit, the 4th day of February, 1928, at 9:09 o'clock A. M., of said day duly recorded in the County Recorder's Office of Maricopa County, Arizona, in Book 209 of Mortgages, at pages 255–256 thereof.

IV.

That thereafter, to wit: and on or about the 8th day of October, 1929, said J. W. Sullivan for value received did sell, assign and transfer said note mentioned in paragraph II of this amended complaint, and did assign the mortgage described in paragraph III of this amended complaint, to the plaintiffs, Sidney P. Osborn and Neri Osborn, Jr., which said assignment of mortgage was duly acknowledged and certified so as to entitle it to be recorded, and the same was on, to wit: the 9th day of October, 1929, at 11:27 A. M. of said day, duly recorded in the County Recorder's office of Maricopa County, Arizona, in Book 16, of Assignments, at page 175 thereof; that plaintiffs are now the owners and hold-

ers of the note and mortgage hereinbefore in this amended complaint described.

V.

That there was on the 1st day of November, 1928, due and owing to the plaintiffs from the defendants, W. J. Bachowetz and Rose Bachowetz, his wife, the sum of Four Thousand Nine Hundred Forty-nine and 69/100 ($4949.69) Dollars, being principal and interest on said promissory note and mortgage according to the terms and conditions thereof to said November 1, 1928, and that no part of said sum has been paid by the said defendants, W. J. Bachowetz and Rose Bachowetz, his wife, nor by *anyone* else, though often demanded.

VI.

That by the terms of said note and mortgage it was further agreed and provided in substance that in the case of the nonpayment of any sum of money, either of principal, interest [148] or taxes, at the time or times when the same shall become due that the mortgagee may pay same and add the amount so paid to the sum secured by the mortgage herein described, and that the same shall bear interest in accordance with the terms of said mortgage; and it is further provided in said mortgage that the mortgagors will pay all costs including the attorney's fees therein provided for, enforcing the provisions of and foreclosing said mortgage, and the reasonable fees and costs for a title search, and all other costs, expenses, and taxes that might be

necessary to be paid by the mortgagee to protect his security.

VII.

That the plaintiffs were compelled to pay city, county and state taxes and assessments on the property herein described, in the sum of Three Hundred Sixty-three and 39/100 ($363.39) Dollars, in order to protect their security; that on the 11th day of October, 1929, plaintiffs in order to protect their security were also required to pay to the Superintendent of Streets of the City of Phoenix the sum of Three Hundred Sixty-four and 94/100 ($364.94) Dollars in order to redeem the property, herein described, and described in said mortgage, from a sale made of said property by the Superintendent of Streets of the City of Phoenix on the 31st day of August, 1929; that the plaintiffs were compelled to incur an expense of Twenty ($20.00) Dollars for a title search to the above-described premises, for the purpose of foreclosure, which defendants have failed to pay; that the plaintiffs have been compelled to employ attorneys to collect the note herein set forth, and to foreclose the mortgage herein described, and have agreed to pay said attorneys a sum equal to ten per cent of the amount found due under said mortgage as provided in said note and mortgage, which sum amounts to Six Hundred ($600.00) Dollars; that there is now due to [149] these plaintiffs upon said note and mortgage as of November 1, 1928, the following sums, principal and interest, on said promissory note and mortgage to November 1, 1928, Four Thousand Nine Hundred Forty Nine

and 69/100 ($4949.69) Dollars; city, county and state taxes and assessments paid by plaintiffs, Three Hundred Sixty Three and 39/100 ($363.39) Dollars; amount paid Superintendent of Streets to redeem said property from sale Three Hundred Sixty Four and 94/100 ($364.94) Dollars; title search of said property Twenty ($20.00) Dollars; attorney's fees Six Hundred ($600.00) Dollars.

VIII.

That the record title to said premises as of the 20th day of November, 1929, appears in Clinton Campbell, Trustee, husband of Lena Campbell.

IX.

That the defendants, W. J. Bachowetz and Rose Bachowetz, his wife, Victor F. Rodriquez, E. H. Wheat, Walter Dubree, Clinton Campbell and Lena Campbell, his wife, O. M. Moore, H. L. Christian, and A. J. Christian, C. P. Munger Rock Company, Arizona Sash-Door & Glass Company, Allison Steel Manufacturing Company, Phoenix Builders' Supply Company, Luther Hill, James Boyd; D. L. Francis, Lyon Francis and Leo Francis, doing business under the name and style of Phoenix Plumbing and Heating Company; Walter J. Thalheimer, Receiver for Phoenix Plumbing and Heating Company, have or claim to have some interest in the property described herein and described in said mortgage herein set forth as judgment creditors, lien holders, encumbrancers, or otherwise, but said claim or claims is and are subsequent and inferior

to the mortgage herein described and sought to be foreclosed by these plaintiffs.

WHEREFORE, plaintiffs pray judgment against W. J. Bachowetz and Rose Bachowetz, his wife: [150]

1. For the sum of Four Thousand Nine Hundred Forty Nine and 69/100 ($4,949.69) Dollars, together with interest thereon at the rate of ten (10%) per cent per annum as provided in said promissory note from November 1, 1928, until paid, together with the further sum of Twenty ($20.00) Dollars on account of title search made for the purpose of foreclosing this mortgage with interest thereon at the rate of six (6%) per cent per annum from date of judgment until paid; together with the further sum of Six Hundred ($600.00) Dollars, attorney's fees with interest thereon at the rate of six (6%) per cent per annum from date of judgment until paid; together with a further sum sufficient to pay all taxes and assessments due, or paid, with interest, penalties and costs; together with the further sum of Three Hundred Sixty Four and 94/100 ($364.94) Dollars, paid by plaintiffs to redeem said property from a sale made by the Superintendent of Streets of the City of Phoenix, with interest thereon at the rate of six (6%) per cent per annum from judgment until paid.

2. For plaintiffs' costs and disbursements herein.

3. That the usual decree may be made for the sale of said premises by the sheriff of Maricopa County, Arizona, according to law, and according to the practice of this court; and that the proceeds of

said sale may be applied to the payment of the amounts due to plaintiff as aforesaid; and that the defendants, W. J. Bachowetz and Rose Bachowetz, his wife, Victor F. Rodriquez, E. H. Wheat, Walter Dubree, Clinton Campbell and Lena Campbell, his wife, O. M. Moore, H. L. Christian and A. J. Christian, C. P. Munger Rock Company, Arizona Sash-Door & Glass Company, Allison Steel Manufacturing Company, Phoenix Builders' Supply Company, Luther Hill, James Boyd; D. L. Francis, Lyon Francis and Leo Francis, doing business under the name and style of Phoenix Plumbing and Heating Company; Walter J. Thalheimer, [151] Receiver for Phoenix Plumbing and Heating Company, and all persons claiming by, through or under them, or either of them, subsequent to the execution of said mortgage upon said premises, either as purchasers, judgment creditors, lien holders or otherwise, may be barred and forever foreclosed of all rights, claims or equity of redemption in the said premises and every part and parcel thereof.

4. That the plaintiffs or any other party to this suit may become a purchaser at said sale, and that upon the expiration of the time allowed by law for the redemption of the premises from such sale the sheriff execute a deed to the purchaser and that the purchaser be let into the possession of the said premises upon the production of the sheriff's deed therefor;

5. That if there is any deficiency after the sale of said property that the plaintiff have execution

against the defendants, W. J. Bachowetz and Rose Bachowetz, his wife, for same.

6. That the plaintiffs may have such other and further relief in the premises as to this Court may seem meet and equitable; and that plaintiffs have general relief.

H. S. McCLUSKEY,
Attorney for Plaintiffs.

BAKER & WHITNEY,
Of Counsel. [152]

B.–522.

PETITIONERS' EXHIBIT No. 24.

In Evidence.

STATEMENT.

FRED NOLL TIRE SERVICE
540–W. Van Buren
PHOENIX, ARIZ.

To D. Francis
Separate from
Plumbing bill during May.

Date	Article	Debits	Credits	Balance
5/9	5 gall gs.....	1.00		
12	tu repair	.50		
13	9½ gall g.....	1.90		
14	12 " "	2.40		
16	1½ " "	.30		
16	2 q oil.....	.70		
27	5 gall gas.....	1.00		
3	5 " " 7 q oil..	3.45		
9	1 q oil.....	.25	Paid	
6	9 gall gas.....	1.80	7–12–29	
24	5¾ gall gas.....	1.15		
24	9 gall gas.....	1.80		
		16.25		

All the above is *use* out figureng job.

D. FRANCIS.

B.–522.

PETITIONERS' EXHIBIT No. 16.

For Identification. [153]

B.–522.

PETITIONER'S EXHIBIT No. 24.

In Evidence.

DEBIT SLIPS.

5/ 9/29 Phx. Plumb. 1 qts. oil..... .25
Marie Francis.

5/14 Phx. Plumbing Co. 10 gals. Gas.....
12 ..... 2.40
Tucson D. Francis.

Phoenix Plumb. Co. 5–13–29 9½ @ 20..... 1.90
Yuma D. Francis.

5/12/29 Phoenix Plumb. 1 tire rep..... .50
chg. D. Francis.

5/ 9/29 Phoenix Plumbing Co. 5 gal. @ 20..... 1.00
D. Francis.

5/10/29 Phoenix Plumb. 1½ gal. Gas @ 20..... .30
D. Francis.

5/10/29 Phoenix Plumb. Co. 2 qts. Oil @ 35..... .70
Dee Francis, M. F.

ay 3 1929 Phx. Plumb. Co. 5 gal. gas, 1.00 .....
7 qt. oil @ 35 2.45..... 3.45
Safford D. Francis Ck. No. 30448.

5/27/29 Phx. Plumbing 5 gal. Gas..... 1.00
Glendale D. Francis.

5/ 6/29 Phoenix Plumb. 9 gallon.....$1.80
Safford. D. Francis.

5/24 Phoenix Plumbing Co. 9 Gal. Gas @ 20..... 1.80
Prescott. D. Francis.

5/24/29 Phx. Plumbing Co. 5¾ gal. Gs. @ 20..... 1.15
Desert Hotel. D. Francis.

Petitioners' Exhibit No. 16 for Identification. [154]

B.–522.

PETITIONERS' EXHIBIT No. 25.

In Evidence.

12–3–29.

Letter Head.

The Southwest Audit Co.

PHOENIX PLUMBING & HEATING COMPANY.

FINANCIAL STATEMENT.

August 17, 1929.

ASSETS:

Cash in Bank	$ 20.97
Cash on Hand	5.42
Accounts Receivable	5,959.70
Contracts Receivable	17,113.57
Mdse.—Inventory—Estimated	3,000.00
Furniture & Fixtures	499.75
Auto Trucks	400.00
Shop Tools & Equipment	365.00
Deficit	43,716.06
TOTAL	$71,080.47

LIABILITIES:

Accounts payable	$64,980.47
Notes Payable—Commercial Nat'l Bank	6,100.00
TOTAL	$71,080.47

[155]

B.–522.

Petitioners' Exhibit No. 25.
In Evidence.
12–3–29.
Letter Head.
The Southwest Audit Co.

PHOENIX PLUMBING & HEATING COMPANY.

FINANCIAL STATEMENT.
April 30, 1929.

ASSETS:

Cash on Hand and in Bank	$ 264.65
Accounts Receivable	5,396.86
Contracts Receivable	27,148.47
Mdse.—Inventory—Estimated	5,000.00
Furniture & Fixtures	499.75
Auto Trucks	400.00
Shop Tools & Equipment	365.00
Deficit	30,165.82
TOTAL	$69,240.35

LIABILITIES:

Accounts Payable	$62,059.73
Contract Payable—Wm. Remsbottom	92.80
Notes Payable—Commercial Nat'l. Bank	6,000.00
Cash Advanced by Joe Thomas	1,087.82
TOTAL	$69,240.35

[156]

B.–522.

PETITIONERS' EXHIBIT No. 26.

In Evidence.
12–5–29.

STATEMENT AS A BASIS FOR CREDIT.
MEMO TO
R. G. DUN & CO.

THE MERCANTILE AGENCY.

On the Financial Condition of The Phoenix, Plumbing & Heating Company.

Location—316 N. 6th Ave. Phoenix, County of Maricopa, State of Arizona.

Business—Plumbing & Heating Contractors & Engineers.

Date to which all the items of the statement relate —June 1, 1928.

Full names of all partners—

Mr. D. L. Francis. Age—34. Married or single—Married.

Mr. Lyon Francis. Age—23. Married or single—Married.

Mr. Leo Francis. Age 22. Married or single—Married.

How long in business here? 11 months. Whom do you succed, if anyone? Wm. Remsbottom. Where from, Town and State? Fort Smith, Arkansas.

Former occupation? Heating & Plumbing Engineers.

Ever fail? No. If so, when and where?

ASSETS.

(When no figures are entered use the word NONE.)

Merchandise on hand at cash value	$ 6,042.95
Outstanding accounts at realizable value	2,642.78
Notes receivable at realizable value	223.10
Cash on hand,) Both	1,684.38
Cash in bank,)	
Machinery, Fixtures, etc	2,244.75
Deposits on plans & bids	1,138.00
Due on contracts	14,300.73
Total available assets	$28,276.99

REAL ESTATE: Describe, locate, and value separately, and in whose name held—NONE.

Total value of real estate.....

Mortgages or amount unpaid thereon ...

Equity in real estate .....

Total worth in and out of business

LIABILITIES.

For merchandise not due (open account)	$ 7,195.36
For merchandise past due (open account)	None
For merchandise (notes payable)	None
Loans from bank	4,000.00
Loans from friends or relatives	None
Int. cont. pay	1,845.08
Cap. Investment Acct.	15,236.55

Other obligations, consisting of $28,276.99

Is the statement of value of stock on hand made upon the basis of an inventory actually taken?

And if so, on what date? Actual inventory, May 31, 1928.

What, in your opinion, is the total amount of your assets and of your liabilities as they are at the date of signing this statement? Total assets $ 25% over the above Total liabilities $ 25% over the above.

Amount of chattel mortgages, if any, on stock or fixtures,—$ None.

If any of the above accounts are pledged state the amount,—$ None.

Are there any existing liens on personal property not mentioned above? If so, what? Conditional sales contract on fixtures & Machinery. [157]

Contingent liabilities upon bills of exchange, endorsements, guarantees, etc.—$ None.

Annual sales (estimate)—$120,000.00. Annual Rent—$636.00.

Annual Expense—$4,500.00.

Do you keep books of account of the business? Yes.

If so, name them—Cost system, cash journal, general ledger, contract & accts. Rec. ledger.

Fire Protection. State its general nature—public fire department, sprinkler system, fire extinguishers, night watchman, etc.—Watchman and Public Fire Dept.

INSURANCE: On Merchandise—$1,800.00. On Machinery and Fixtures—$500.00. On Buildings—$ None.

Did you ever suffer a fire loss? No. If so, where and when? ———

Did fire originate on your premises? ———

Do you carry employer's liability insurance? Yes.

Date of signing statement—August 14, 1928.

PHOENIX PLUMBING & HEATING.

PAUL E. GEHRES,

Cashier.

B.–522. Petitioners' Exhibit No. 17 for Identification. [158]

IMPORTANT.

Kindly give the names of a few houses from whom you make your largest purchases.

Name	Street Address	City and State	Amount Owing
Standard San. Mfg. Co.	447 E. Jefferson	Phoenix, Arizona	Current.
Crane Company	233 S. 1st Ave	Phoenix, Arizona	Current.

Bank with Commercial National Bank of Phoenix, Arizona.

TRUE COPY OF ENVELOPE.

Phoenix Plumbing & Heating Co.
316 North Sixth Avenue
Phoenix, Arizona.

Postal cancellation
Phoenix
Aug. 14
1. 5:30 PM
1928
ARIZ.

R. G. DUN & COMPANY
Heard Building
Phoenix, Arizona.

(Stamp)

This envelope contained statement of Phoenix Plbg. & Htg. Co.

Received by me 8/15 1928.

(Signature) Z. [159]

B.–522.

PETITIONERS' EXHIBIT No. 27.

In Evidence.

PHOENIX PLUMBING & HEATING COMPANY,

Phoenix, Arizona.

Work in Progess and Finished.

February 15th, 1929.

Job.	Contract Amt.	Paid	% Complete	Bal. Due
Arizona Grocery Co.	$ 105.00	——	60%	105.00
Arizona Guarantee Mortgage Co.	746.75	——	Not Started	746.75
Backowetz Apartment	3,700.00	——	65%	3,700.00
Buckeye Arizona School	5,635.50	$ 5,462.50	Finished	173.00
State Insane Hospital	6,841.00	3,580.00	60%	3,261.00
Phoenix City Hall	22,374.00	12,375.00	80%	9,999.00
Episcopal Deanery	2,563.90	2,325.00	Finished	238.90
Washington School Building	695.00	——	50%	695.00
Dan Campbell Residence	1,530.00	——	50%	1,530.00

Job.	Contract Amt.	Paid	% Complete	Bal. Due
H. H. Green New Residence	$1,723.97	$1,700.00	95%	23.97
H. H. Green Old "	469.00	——	60%	469.00
W. W. Knorpp Residence	1,640.40	1,230.30	90%	410.10
Mr. Dowell Residence	2,540.00	——	40%	2,540.00
E. J. Bennett Residence	3,898.30	2,200.00	80%	1,698.30
Lincoln Mortgage Co. Balance Due on 41 cottages now finished				15,435.92
Mesa Bank Building	5,228.00	1,582.50	75%	3,645.50
Patterson Residence	306.54	264.00	Finished	42.54
Grace Lutheran Church	594.50	297.25	Finished	297.25
Phoenix High School Stadium	16,116.50	15,469.90	Finished	646.60
Phoenix " " Library Bldg.	17,822.00	2,437.50	40%	15,384.50
Phoenix " " Heating Plant	27,819.00	12,580.00	85%	15,239.00
Phoenix Junior College Bldg.	8,424.00	3,787.50	70%	4,636.50
Dr. Shackleford Residence	564.00	——	50%	564.00
Tolleson Arizona School Bldg.	3,871.00	2,150.00	Finished	1,721.00

Job.	Amt. Contract	Paid	% Complete	Bal. Due
Mel Fickas Residence	$1,069.00	——	50%	1,069.00
Marcus B. Kelley Residence	648.75	——	50%	648.75
Linn Lockhart Residence	4,461.00	1,937.50	80%	2,523.50
H. Keyfavur Residence	1,280.00	——	60%	1,280.00
Hoggan Residence	346.75	——	50%	346.75
Frank Bowman Residence	237.00	——	60%	237.00
Joe Samardo Residence	140.00	40.00	95%	100.00
Getney & Snell Residence	336.75	——	60%	336.75
Perry & Taylor Residence	491.00	——	Finished	491.00
			Unpaid Balance	$90,235.58

Mr. D. L. Francis, Mgr., aided by figures from the wholesale houses on a very liberal estimate that it will require the sum of $48,550.00 to cover all MATERIAL & LABOR necessary to complete all of the above work.

Signed—PAUL C. GEHRES,
Phoenix Plumbing & Heating Co.

The above is a true and correct statement of the work in progress and completed this fifteenth day of February, 1929.

B.–522.

PETITIONERS' EXHIBIT No. 18.

For Identification. [160]

B.–522.

PETITIONERS' EXHIBIT No. 28.

In Evidence.

Phoenix, Arizona, June 6, 1929.

For value received, the undersigned hereby sells, transfers, sets over and assigns to Crane Co. all his right, title and interest in and to his book accounts and claims of every nature against the following named persons in the following named amounts, to wit:

($1000.00 due from E. J. Bennitt, Country Club Drive, Phoenix, Ariz.

(Pencil Notation) (800.00 due from Harry Tritle, No. Alvarado St., Phoenix.

Go after. not legible 24465 (500.00 due from O. P. Johnson, Verde Lane, Phoenix.

(800.00 due from Frank B. Schwentker, Alvarado & Monte Vista, Phoenix.

~~500.00 due from Marana Teacherage Building, Marana, Arizona.~~ (Pencil Notation) ~~Pd Jan 21~~

~~500.00 due from Dan Campbell, W. Cambridge St., Phoenix.~~ (Pencil Notation) ~~Paid 7/17/29~~

225.00 due from James Barnes, ~~1300~~ 1606 ~~Block~~ W. ~~Latham~~ St., Lynwood Phoenix.

400.00 due from O. R. Bell, 917 No. 8th St., Phoenix.) 400.00
) 196.01 Pd. 7/31/29
) 203.99 Bal. due.
)
)
)
)

PHOENIX PLUMBING & HEATING CO..
By LEO FRANCIS,
Owner.

Approved:

CLIFF FRYBERGER,

Manager.

We, the above named, hereby consent to, accept and agree to the above named assignment.

Accepted by E. J. Bennett for the amount finally found due but not to exceed one thousand dollars. June 2/1929.

E. J. BENNETT.

(Pencil Not.) Jas. W. Barnes amount $225.00 6/9/29.

Petitioners' Exhibit No. 19 for Identification. [161]

B.–522.

PETITIONERS' EXHIBIT No. 29.

In Evidence.

12–11–29.

Letter Head.

STANDARD SANITARY MFG. CO.

447 E. Jefferson Street,

Phoenix, Arizona.

June 7, 1929.

To whom it May Concern:

After reviewing assignments given by Phoenix Plumbing and Heating Company to Crane Company, covering the following jobs, in amounts as stated, to-wit:

$1,000.00 due from E. J. Bennitt, Country Club Drive, Phoenix, Arizona.

800.00 due from Harry Tritle, No. Alvarado St., Phoenix.

500.00 due from O. P. Johnson, Verde Lane, Phoenix.

800.00 due from Frank B. Schwentker, Alvarado & Monte Vista, Phoenix.

500.00 due from Marana Teacherage Building, Marana, Arizona.

500.00 due from Dan Campbell, West Cambridge St., Phoenix.

225.00 due from James Barnes, 1300 Block W. Latham Street, Phoenix.

400.00 due from O. R. Bell, 917 N. 8th Street, Phoenix.

We do herewith release our rights, title and interest in the above accounts, in the amounts,as,stated, and do herewith relinquish any and all lien rights we may have in said jobs, except in any amount above that which is entered against such jobs in this instrument.

Yours truly,
STANDARD SANITARY MFG. CO.
By I. L. NIHELL.
I. L. NIHELL.

ILN: HL.

B.–522. Petitioners' Exhibit No. 20 for Identification 12–11–29. [162]

B.–522.

PETITIONERS' EXHIBIT No. 30.

In Evidence.

12–11–29.

"COPY."

ARMSTRONG, LEWIS & KRAMER,

Phoenix, Arizona.

Southern Surety Company of N. Y.

Los Angeles, Calif.

RE: CITY HALL PLUMBING CONTRACT—PHOENIX PLUMBING & HEATING CO.

Gentlemen:

We are counsel for the Standard Sanitary Manufacturing Co. with offices in Phoenix, and we have before us the figures showing the status of the City Hall job.

There remains to be paid on the contract by the City of Phoenix to the Phoenix Plumbing and Heating Company the sum of $8,700 and some odd dollars. The unpaid material bills for materials furnished and now installed in the City Hall, standing on the books of the Standard Sanitary Manufacturing Co. against the Phoenix Plumbing and Heating, amount to the sum of $16,918.74.

Under the terms of the contract and bond of the Phoenix Plumbing and Heating Company which your company underwrote, your company is liable for the payment of this amount. There appears no possibilty of the Phoenix Plumbing & Heating Co. paying the difference between the amount due on the

job and the amount due for materials furnished therefor; hence, we are compelled to make demand upon you for the payment of the $16,918.74 due for materials installed in the building.

We would appreciate your early consideration of and decision, on this demand.

Yours very truly,
ARMSTRONG, LEWIS & KRAMER,
By FRANK J. DUFFY.

Petitioners' Exhibit No. 10 for Identification. [163]

B.–522.

PETITIONERS' EXHIBIT No. 30.
In Evidence.
12–11–29.
Letter Head.

SOUTHERN SURETY COMPANY OF NEW YORK,
1201 National City Bank Building,
Los Angeles, Calif.
August 8, 1929.

Phoenix Plumbing & Heating Co.,
316 North Sixth Ave.,
Phoenix, Arizona.
Atten: Mr. Fryberger.

Re: Bond 453393—Phoenix Plumbing & Heating Company to City of Phoenix—Plumbing contract in New City Hall Building at Phoenix —LA#1578—28.

Gentlemen:

With reference to the above contract, we enclose

B.–522.

PETITIONERS' EXHIBIT No. 30.
In Evidence.
12–11–29.
"COPY."

ARMSTRONG, LEWIS & KRAMER,
Phoenix, Arizona.

Southern Surety Company of N. Y.
Los Angeles, Calif.

RE: CITY HALL PLUMBING CONTRACT—
PHOENIX PLUMBING & HEATING CO.

Gentlemen:

We are counsel for the Standard Sanitary Manufacturing Co. with offices in Phoenix, and we have before us the figures showing the status of the City Hall job.

There remains to be paid on the contract by the City of Phoenix to the Phoenix Plumbing and Heating Company the sum of $8,700 and some odd dollars. The unpaid material bills for materials furnished and now installed in the City Hall, standing on the books of the Standard Sanitary Manufacturing Co. against the Phoenix Plumbing and Heating, amount to the sum of $16,918.74.

Under the terms of the contract and bond of the Phoenix Plumbing and Heating Company which your company underwrote, your company is liable for the payment of this amount. There appears no possibilty of the Phoenix Plumbing & Heating Co. paying the difference between the amount due on the

job and the amount due for materials furnished therefor; hence, we are compelled to make demand upon you for the payment of the $16,918.74 due for materials installed in the building.

We would appreciate your early consideration of and decision, on this demand.

Yours very truly,
ARMSTRONG, LEWIS & KRAMER,
By FRANK J. DUFFY.

Petitioners' Exhibit No. 10 for Identification. [163]

B.–522.

PETITIONERS' EXHIBIT No. 30.
In Evidence.
12–11–29.
Letter Head.

SOUTHERN SURETY COMPANY OF NEW YORK,
1201 National City Bank Building,
Los Angeles, Calif.
August 8, 1929.

Phoenix Plumbing & Heating Co.,
316 North Sixth Ave.,
Phoenix, Arizona.
Atten: Mr. Fryberger.

Re: Bond 453393—Phoenix Plumbing & Heating Company to City of Phoenix—Plumbing contract in New City Hall Building at Phoenix —LA#1578—28.

Gentlemen:

With reference to the above contract, we enclose

copy of letter dated August 6th from Attorneys Armstrong, Lewis & Kramer, which is self explanatory.

We had hoped that you would be able to work out of your difficulties without any of the creditors making formal demand for the payment of their accounts. I wish you would write me in some detail what progress you have made since my talk with you in Phoenix, and whether you think it would be possible to reach a satisfactory adjustment with the Standard on some basis by which this creditor will look to you for payment.

You might have a talk with the Standard manager before writing me. I shall hope to hear from you by the middle of next week.

Yours very truly,
L. D. BARTLETT,
Claims Manager.

LDB:MB.
ENC:

Petitioners' Exhibit No. 10 for Identification. [164]

B–522.

PETITIONERS' EXHIBIT No. 31.
In Evidence.
12–11–29.

To the Board of Trustees of Phoenix Union High School District, Maricopa County, Arizona.

Gentlemen:

On the 18th day of October, 1928, I entered into a contract with your District wherein, among other

things, I agreed to the satisfaction and under the direction of your District and Lescher & Mahoney, the Architects for the District, to provide all the materials and perform all the work mentioned in the specifications and as shown upon the drawings prepared by said architects for the installation and completion of the plumbing, heating and ventilating in the library and classroom building located on property belonging to the District, bounded by Sixth, Seventh, Taylor and Van Buren Streets, in the City of Phoenix, Arizona, and for the faithful performance of which contract the District agrees to pay me the sum of $18,828.00 as follows:

$10,330.00 for the installation of the heating and ventilating and $8,498.00 for the installation of the plumbing, payments to be made upon estimates and certificates of the architects upon the 1st and 15th days of each month for seventy-five per cent of the cost of materials furnished on the ground or placed in the building and labor performed thereon, the final payment of twenty-five per cent reserved from previous estimates or installment payments to be made when the building is completed and finally accepted by the District, and upon which contract there has been paid me up to this date approximately $9,000.00. I wish to advise you that owing to unforseen financial difficulties I have fallen in, the Standard Sanitary Manufacturing Company at Phoenix, Arizona, who has been furnishing me the materials to perform said contract now refuses to furnish me further materials for use in the completion of the contract, and in as much as I cannot obtain the necessary materials from any

other source to fulfil the contract with I have appealed to the American Bonding Company of Baltimore, the surety on my bond for the performance of said contract, to financially assist me in securing the necessary materials to complete the contract and in the circumstances, the American Bonding Company of Baltimore as the surety on my bond has consented to secure for me the materials necessary to complete the contract, as well as money necessary to pay the labor to properly install said materials provided I protect said surety for the materials which it will furnish me and the moneys to be paid by it for the labor to install said materials under the contract.

Therefore, in order to perform said contract and complete the same to the satisfaction of your District and said architects, and to protect said surety, I hereby authorize and empower you to pay over to the American Bonding Company of Baltimore, a corporation, the surety on my bond for the fulfillment of said contract, all moneys now due me or to become due to me under the terms of said contract and which will amount to approximately $9,000.00 when said contract is completed, and I hereby authorize and empower said American Bonding Company of Baltimore to receipt for said Board of Trustees of Phoenix.
Union High School District—

[165] moneys in my name to your District and when so receipted for by said American Bonding Company of Baltimore it shall be deemed as my receipt therefor, and I hereby waive any and all

claim against your District for said moneys or any part thereof which may be paid to said American Bonding Company of Baltimore as above stated.

I also wish to advise you that I have and do now rescind and recall any and all assignments by me heretofore made of the moneys due and to become due under said contract to any and all persons, corporations, partnerships or associations, and direct and authorize you to ignore and disregard any such assignments whether the same have been heretofore or may hereafter be presented to you.

Signed LEO FRANCIS.

Phoenix, Arizona, August 6th 1929.

I, J. W. Laur, of Maricopa County, State of Arizona, do hereby swear that the above is a true and exact copy of the original letter.

J. W. LAUR.

Sworn and subscribed to before me, a notary public in and for the County of Maricopa, State of Arizona, this 3d day of December, 1929, at Phoenix, Arizona.

[Seal] P. S. BASSFORD.

My commission expires Mar. 30, 1930.

B.–522. Petitioners' Exhibit No. 21 for Identification. [166]

B.–522.

PETITIONERS' EXHIBIT No. 32.

In Evidence.

12–11–29.

Letter Head.

PHOENIX PLUMBING & HEATING COMPANY,

316 North Sixth Avenue,

Phoenix, Arizona,

May 7, 1929.

To Whom it May Concern:

We herewith assign all moneys now due us or to become due for Plumbing on the High School Library Building, Phoenix, Arizona, to the STANDARD SANITARY MFG. CO., 447 East Jefferson Street, Phoenix, Arizona; and do herewith instruct your Honorable School Board, Clerk of the Board, or any other party or parties to whom this may be addressed, to make payment of said moneys to the above named firm at the address given above, as said sums may become due.

Yours truly,

PHOENIX PLUMBING & HEATING CO.

By D. FRANCIS, Manager.

Witness to above signature:

PAUL C. GEHRES.

B.–522. Petitioners' Exhibit No. 22 for Identification. 12–11–29. [167]

B.–522.

PETITIONERS' EXHIBIT No. 32.

In Evidence.

12–11–29.

Letter Head.

PHOENIX PLUMBING & HEATING COMPANY,

316 North Sixth Avenue,

Phoenix, Arizona,

May 7, 1929.

TO WHOM IT MAY CONCERN:

We hereby assign all moneys now due us or to become due us on Contract for Plumbing on the Phoenix Junior College Job, Phoenix, Arizona, to the STANDARD SANITARY MFG. CO., 447 East Jefferson Street, Phoenix, Arizona; and do herewith instruct your Honorable School Board, Clerk of the Board or other party or parties to whom this may be addressed, to make payment of said moneys to the above firm at the address given above, as said sums may become due.

Yours truly,

PHOENIX PLUMBING & HEATING CO.,

By D. FRANCIS,

Manager.

Witness to above signature:

PAUL C. GEHRES.

B.–522. Petitioners' Exhibit No. 22 for Identification. 12–11–29. [168]

B–522.

PETITIONERS' EXHIBIT No. 32.

In Evidence.

12–11–29.

Letter Head.

PHOENIX PLUMBING & HEATING COMPANY,

316 North Sixth Avenue,

Phoenix, Arizona,

May 7, 1929.

To Whom it May Concern:

We herewith assign all moneys now due or to become due on Contract for Material and Labor on the High School Heating Plant, Phoenix, Arizona, to the STANDARD SANITARY MFG. CO., 447 East Jefferson Street, Phoenix, Arizona; and do herewith instruct the Honorable School Board, Clerk of the Board, or any other party or parties who may be designated to make payment of this money, to make payment of same to the above named firm at the address given, as such payments may become due.

Yours truly,

PHOENIX PLUMBING & HEATING CO.

By D. FRANCIS,

Manager.

Witness to above signature.

PAUL C. GEHRES.

B.–522. Petitioners' Exhibit No. 22 for Identification. 12–11–29. [169]

B.–522.

PETITIONERS' EXHIBIT No. 33.

In Evidence.

12–11–29.

Letter Head.

STANDARD SANITARY MFG. CO.

447 E. Jefferson Street,

Phoenix, Arizona.

April 26, 1929.

Board of Trustees,

Yuma High School,

Yuma, Arizona.

Att'n Clerk of the Board:

Gentlemen:

We hereby assign all moneys now due us or to become due us on Contract for Plumbing on the Yuma High School Gymnasium, Yuma, Arizona, to the STANDARD SANITARY MFG. CO., 447 East Jefferson Street, Phoenix, Arizona; and do herewith instruct your Honorable School Board, yourself, or any other party or parties to whom this may be addressed, to make payment of said moneys to the above-named firm at the address given above, as said sums may become due.

Yours truly,

PHOENIX PLUMBING & HEATING CO.

By LEO FRANCIS,

Owner.

Witness: HELEN LANGDON.

Petitioners' Exhibit No. 23 for Identification.

[170]

B.–522.

PETITIONERS' EXHIBIT No. 34.

In Evidence.

12–11–29.

Face of Exhibit:

Builders. Subdividers. Brokers.

LINCOLN MORTGAGE COMPANY,

Lincoln Built Homes.

No. 2489.

Phoenix, Arizona, June–8 '29.

Pay to the order of Phoenix Plumbing & Heating Co. $14000.00 Lincoln Mortgage Co.—Fourteen Thousand Dollars *Dollars.*

LINCOLN MORTGAGE COMPANY.

M. E. WADDOUPS,

C. N. WYNN.

CITIZENS STATE BANK.

91–6.

Phoenix, Arizona.

HENRY O. DORMAN.

This voucher is a Payment in Full of the Within Account and the Payee Accepts it as Such by Endorsement Below.

Endorse Here.

Phoenix Plumbing & Heating Co.

Cliff B. Freyberger, Mgr.

Petitioners' Exhibit No. 24 for Identification.

[171]

B.–522.

PETITIONERS' EXHIBIT No. 34.

In Evidence.

12–11–29.

(Back of Exhibit.)

LINCOLN MORTGAGE COMPANY,

214 North Central Avenue.

To Phoenix Plumbing & Heating Company—Dr.

Date	Detail			Amounts			
6/8/29	Payments in full for plumbing on following jobs:						
	#59 Crider #1	$ 228.15	#60 Crider #2	$239.55	#35 Smith #1		$230.82
	#52 Statler #2	425.00	#43 Files	182.84	#17 Baxter		190.00
	#57 Lewis	475.00	#48 Williams	437.00	#24 Lee		175.00
	#56 Clayton	800.00	#25 McGowan	150.00	#34 Shaw		371.38
	#53 Peck	276.00	#63 Kimball	344.00	#54 Radcliffe		273.57

Date		Detail		Amounts	
#49 Statler #1	$ 246.00	#47 Loza	$1134.52	#15 Ott	$ 240.00
#38 De La Cruz	202.13	#44 Niles	588.67	#26 Steele	283.45
#23 Rothermel	250.00	#30 Green	115.90	#39 Butler	457.52
#31 Miller	350.00	#28 Vaughn	340.00	#51 Anderson	620.00
#41 Harris	518.24	#42 Kennedy	112.37	#50 Berry	313.03
#40 Lane	402.82	#46 Mitchell	119.88	#32 Lair	182.62
#58 Lewis	1916.25	#36 Hatchell	300.00	#37 Reed	199.37
#61 Lynch	257.77	#55 Smith #2	247.92		
		Total	$14,196.77		
		Credit	196.77		
			$14,000.00	Total amount	$14,000.00

Charge or credit job or department.

Construction

Approved—H. O. D.

PETITIONERS' EXHIBIT No. 24.

For Identification. [172]

B.–522.

PETITIONERS' EXHIBIT No. 35.
In Evidence.
12–11–29.

BALANCE SHEET OF THE PHOENIX PLUMBING AND HEATING COMPANY, AS OF JULY 20th, 1929.

ASSETS.

Cash on hand	$ 150.00
Accounts Receivable	3,935.92
Contracts Receivable	45,119.90
Inventory	4,850.00
Labor furnished on Safford Hotel job.. (Estimated)	1,000.00
Deficit	20,436.25
Total	$75,492.07

LIABILITIES.

Accrued Salaries	$ 107.50
Payroll week ending July 20, 1929	550.00
Estimated Labor to complete contract	1,395.00
Estimated material to complete contracts.	13,850.00
Notes payable bank	6,100.00
Accounts payable miscellaneous	15,548.57
Accounts payable Standard Sanitary Mfg. Co.	37,941.00
Total	$75,492.07

Petitioners' Exhibit No. 13 for Identification. 11–20–29. [173]

B.–522.

PETITIONERS' EXHIBIT No. 36.

In Evidence.
Filed Dec. 12–1929.

Letter Head.

STANDARD SANITARY MFG. Co.
447 E. Jefferson Street,
Phoenix, Ariz.

December 12, 1929.

Mr. Frank Duffy,
Attorney at Law,
Phoenix, Arizona.

Dear Sir:

With reference to the following items appearing as credits on the account of the Phoenix Plumbing and Heating Company:

Item #1—August 3, 1929, amount.....$166.79
Item #2—August 6, 1929, amount..... 300.00
Item #3—August 8, 1929, amount.....1254.00
Item #4—August 10, 1929, amount..... 343.75
Item #5—August 16, 1929, amount.....1000.00

Item #1 is cash received and covering miscellaneous small repair jobs.

Item #2 is remittance received from the Phoenix Plumbing and Heating Company on the John Mason Ross Job. The same applies to item #4. A release has been issued on this job.

Item #3 covers remittance received from the Phoenix Plumbing and Heating Company on the O. P. Johnson Job, which job has just been finished and will of necessity have to be liened, unless we

receive a remittance for the balance immediately.

Item #5 is an advance amount for materials to be used in the Safford Hotel Job, paid by the McGinty Construction Company.

Trusting the above information is satisfactory, we are

Yours truly,
STANDARD SANITARY MFG. CO.
By R. C. BOWER,
R. C. BOWER,
Asst. Mgr.

RCB:HL. [174]

B.–522.

PETITIONERS' EXHIBIT No. 37.

In Evidence.
Filed 12–27–29.

THIS AGREEMENT made and entered into this 11th day of July, 1929, between LEO FRANCIS, doing business under the firm name and style of PHOENIX PLUMBING & HEATING CO., of Phoenix, Arizona, hereinafter referred to as assignor, and L. W. FRYBERGER, of Phoenix, Arizona, hereinafter referred to as assignee, and the creditors of said assignor, consenting in writing to this agreement, hereinafter referred to as the creditors.

WITNESSETH:

That said assignor for and in consideration of the covenants and agreements to be performed by the other parties hereto, as hereinafter contained, and of the sum of One Dollar ($1.00) to the assignor in hand paid by the assignee, receipt whereof

is hereby acknowledged, does by these presents grant, bargain, sell, assign and transfer unto said assignee, his heirs and assigns forever, all of the property of the assignor of every kind and nature, and wheresoever situated, both real and personal, and any interest or equity therein not exempt from execution, including particularly all of the stock of merchandise, furniture, fixtures, bills receivable, accounts receivable, situated in or connected with or pertaining to the plumbing and heating business now owned, conducted and operated by the assignor at 316 North Sixth Avenue, Phoenix, Arizona, and including choses in action, insurance policies, cash on hand, and all other assets of any nature whatsoever.

It is understood, however, that heretofore and at various times during the past eight or ten months assignor above named has in various instances assigned and transferred to various of his creditors accounts receivable or certain interests [175] in accounts receivable owned by said assignor, said creditors having furnished materials on jobs being completed by assignor; it is hereby expressly understood that the following assignments of claims due said assignor for work done and materials furnished in the following mentioned contracts are recognized as valid, and are to be paid to the assignees, and constitute no part of the assets of said assignor:

Job	Assigned to:	Amount.
E. J. Bennitt	Crane Co.	$1000.00
Harry Tritle	Crane Co.	800.00
O. P. Johnson	Crane Co.	500.00
Frank B. Schwentker	Crane Co.	800.00
James Barnes	Crane Co.	225.00
O. R. Bell	Crane Co.	400.00
Dan Campbell	Crane Co.	500.00
Junior College	Standard Sanitary Mfg. Co.	2257.20
Library Building	Standard Sanitary Mfg. Co.	9410.12
State Insane Asylum	Standard Sanitary Mfg. Co.	2815.30
City Hall	Standard Sanitary Mfg. Co.	8707.85
Yuma School	Standard Sanitary Mfg. Co.	2717.00
Central Heating Plant	Standard Sanitary Mfg. Co.	3507.10

and it being agreed that all creditors having or claiming to have liens on account of work done or materials furnished by said assignors waive their liens.

Said assignee is to receive the said property, conduct the said business should he deem it proper, and he is hereby authorized at any time after the signing hereof by the said assignor, to sell and dispose of the said property on such time and terms as he may see fit, and he is to pay to said creditors *pro rata,* according to the several indebtednesses due to them from said assignor, the net proceeds arising from the conduct of said business and sale and disposal of said property, after deducting all moneys which said assignee may at his option pay for the discharge of any lien on any of said property, and any indebtedness which under the law is entitled to priority of payment, also all expenses incurred.

In consideration of the premises parties of the third [176] part agree to accept their *pro rata* portion of the net recoveries of this estate as paid to them by said assignee, in full payment and satisfaction of their several indebtednesses, and release said assignor from all claims and demands that they now have against said assignor, provided, however, that this agreement to accept said *pro rata* and release said assignor is to become inoperative and void at the option of any of the third parties without notice if anything intervenes to prevent the payment of said *pro rata* to said third parties by any act of said assignor or any creditor of said assignor.

IN WITNESS WHEREOF the assignor and assignee have hereunto set their hands the day and year first above written, and the joining of said creditors to be evidenced by their separate consent in writing, and by filing of their claims with the assignee.

_____,
Assignor.

_____,
Assignee.

State of Arizona,
County of Maricopa,—ss.

On this —— day of July, 1929, before me, a Notary Public in and for the County of Maricopa, State of Arizona, personally appeared Leo Francis known to me to be the person whose name is subscribed to the within and foregoing instrument,

and acknowledged to me that he executed the same for the purposes therein expressed.

_____,
Notary Public.

My commission expires: ————. [177]

B.–522.

ALLEGED BANKRUPTS' EXHIBIT No. 1.
In Evidence.
Filed 11–21–29.

POWER OF ATTORNEY.

KNOW ALL MEN BY THESE PRESENTS: That I, Leo Francis of Calhoun, in the County of LeFlore and State of Oklahoma, have made, constituted and appointed, and by there presents do make, constitute and appoint Dee Francis of Phoenix, Arizona, my true and lawful attorney, for me and in my name place and stead, and to my use, to conduct my plumbing business now located at 316 North 6th Avenue, Phoenix, Arizona, to buy new stock, contract and carry on the business the same as if I was present and acting in my own person, giving my said attorney full power to everything whatsoever, requisite and necessary to be done in the conduct of said business as fully as I could do if present and acting in my own proper person.

Hereby ratifying and confirming all that my said attorney shall lawfully do or cause to be done by virtue hereof.

In witness whereof I have hereto set my hand and seal this the 9th day of April, 1928.

LEO FRANCIS.

ACKNOWLEDGMENT.

State of Oklahoma,
County of LeFlore,—ss.

Before me, a Notary Public in and for said County and State on this the 9th day of April, 1928, personally appeared Lee Francis, to me known to be the identical person who executed the within and foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and seal this the 9th day of April, 1928.

[Seal] OLIN BURTON,
Notary Public.

My commission expires: 2/16 1932. [178]

B.–522.

ALLEGED BANKRUPTS' EXHIBIT No. 2.
In Evidence.
11–27–29.

Phoenix, Arizona.
October 5, 1927.

This is to certify that I have this date received from Dee Francis the sum of $1,600.00 the same to apply on payment of Plumbing Business, stock in trade, fixtures, equipment and good will of said plumbing business located at 316 North Sixth Avenue, Phoenix, Arizona. Said sale to be made in accordance with an agreement which I have this date signed in which agreement Leo Francis agrees to

purchase said plumbing business and fixtures aforesaid.

WM. REMSBOTTOM. [179]

B.–522.

ALLEGED BANKRUPTS' EXHIBIT No. 3.
In Evidence.
11–27–29.

BILL OF SALE.

KNOW ALL MEN BY THESE PRESENTS: That Wm. Remsbottom, the party of the first part, for and in consideration of the sum of Ten Dollars and other valuable consideration *Dollars* lawful money of the United States of America, to him in hand paid by Leo Francis the party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell and convey unto the said party of the second part, and his heirs, executors, administrators and assigns ——*666*

the plumbing business, stock in trade, fixtures and equipment used in said plumbing business, together with the good will of said plumbing business; said plumbing business, stock in trade, fixtures and equipment being located at 316 North Sixth Avenue, Phoenix, Arizona;

TO HAVE AND TO HOLD the same to the said party of the second part, his heirs, executors, administrators and assigns forever; and the said party of the first part does for his heirs, executors, administrators and assigns, covenant and agree to and with the said party of the second part, his heirs, executors, administrators and assigns, to warrant and defend the sale of the said property, goods and

chattels hereby made unto the said party of the second part, his heirs, executors, administrators and assigns, against all and every person or persons whomsoever lawfully claiming or to claim the same.

IN WITNESS WHEREOF I have hereunto set my hand the 14th day of October, A. D. 1927.

WM. REMSBOTTOM. [180]

B.–522.

ALLEGED BANKRUPTS' EXHIBIT No. 3.

In Evidence.

11–21–29.

Reverse of Exhibit.

State of Arizona,
County of Maricopa,—ss.

Before me, ————, a Notary Public in and for the county of Maricopa, State of Arizona, on this day personally appeared Wm. Remsbottom, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purpose and consideration therein expressed.

Given under my hand and seal of office this 14th day of October, A. D. 1927.

[Seal] D. E. WILSON,
Notary Public.

My commission expires Feb. 6, 1930.

State of Arizona,
County of Maricopa,—ss.

I (or we) hereby declare on oath that the within named Wm. Remsbottom, party of the first part, is (or are) the sole owner of the chattels set out in

the within and foregoing bill of sale, and that said chattels are clear, free and unincumbered.

Witness my hand this 14th day of October, A. D. 1927.

[Seal] WM. REMSBOTTOM.

Subscribed and sworn to before me this 14th day of October, A. D. 1927.

My commission expires Feb. 6, 1930.

D. E. WILSON,
Notary Public. [181]

B.–522—Page 2.

ALLEGED BANKRUPTS' EXHIBIT No. 3.

In Evidence.
Reverse of Exhibit.
No. ———.
BILL OF SALE.
Short Form.
From

_____

To

_____

Dated ————, 192—.

Report of Special Master. Filed Feb. 18, 1930. C. R. McFall, Clark United States District Court for the District of Arizona. H. F. Schlittler, Deputy Clark. [182]

RESPONDENTS' EXHIBIT "A."

For Identification.

(COPY.)

PHOENIX PLUMBING AND HEATING COMPANY.

June 22, 1929.

ASSETS:		
Cash on Hand	$2037.45	
Cash in Bank (Overdraft)	907.54	$ 1129.91
Contracts Receivable		47400.64
A/C Rec. Since Jan. 1, 1929		2327.96
A/C Rec. Prior Jan. 1, 1929		1562.02
Due from Others		850.00
Inventory		5000.00
		$58270.53
LIABILITIES:		
Accounts Payable	$46,451.74	
Notes Payable	6,100.00	
Net Worth	5,718.79	
		$58270.53

[183]

B.–522.

RESPONDENTS' EXHIBIT "B."

In Evidence.

Face of Exhibit.

Phoenix, Arizona, May 15, 1929.

To the Commercial National Bank of Phoenix, Arizona.

I hereby make application for a loan of $2,000.00

we

payable 15 days after date on our name with collat-

my

eral as follows:

PHOENIX PLUMBING & HEATING CO.

Purpose of Proceeds:

Payroll

Back of Exhibit.

Present Loan $————————

Present Contingent $————————

Present Rate:

High Loan: 3–3–27. $7,000.00

Average Balances:

192— $————————

192— $————————

Total Deposits

192— $————————

192— $————————

Financial Statement ————————

Quick Assets, $————————

Current Debts, $————————

Stockholder? ————————

Remarks: ————————

Approved: T. G. Norris.
I. Rosenzweig.
G. M. N.

Petitioners' Exhibit No. 24 for Identification. [184]

B.–522.

RESPONDENTS' EXHIBIT "C."
In Evidence.
Letter Head
PHOENIX PLUMBING & HEATING COMPANY,
316 North Sixth Avenue.
Phoenix, Arizona.

March 5th, 1929.

Standard Sanitary Mfg. Co.,
447 East Jefferson St.,
Phoenix, Arizona.

Gentlemen:

You are by this instrument authorized to draw on Lincoln Mortgage Co., of this city in the amount of Fourteen Thousand One Hundred Ninety Six Dollars Seventy Seven Cents, ($14,196.77).

Which sum represents money due this firm for work and materials furnished in the construction of various houses and store buildings owned by The aforesaid Lincoln Mortgage Co.,

This assignment effective this date.

PHOENIX PLUMBING & HEATING CO.
By D. FRANCES.

Respondents' Exhibit "C" for Identification. [185]

B.–522.

RESPONDENTS' EXHIBIT "D."

In Evidence.

12–11–29.

Letter Head

STANDARD SANITARY MFG. CO.,

447 E. Jefferson Street,

Phoenix, Ariz.

December 5, 1928.

TO WHOM IT MAY CONCERN:

We hereby assign all moneys now due or to become due us on contract for plumbing and heating on State Hospital Job, now under construction, on Tempe Road near Phoenix, Arizona, to the STANDARD SANITARY MFG. CO., 447 EAST JEFFERSON STREET, PHOENIX, ARIZONA; and do herewith instruct the general contractor on this job or other party or parties who are or may be designated to pay out moneys on construction work on this job, to make payment of said moneys to the above named firm at the address given above as said sums may become due.

Yours truly,

PHOENIX PLUMBING & HEATING CO.

By D. Francis,

Manager.

WITNESS:

FRANK J. CAMPBELL—12/5/28.

I. L. NIHELL.

I herewith accept above assignment in the amount

of amount due and agree to make payment of money as stated herein.

W. H. BROWN.

Signed—June 23, 1929. Date ————.

Witness ————.

Respondents' Exhibit "D" for Identification. [186]

B.–522.

RESPONDENTS' EXHIBIT "E."

In Evidence.

12–11–29.

Letter Head

STANDARD SANITARY MFG. CO.,

447 E. Jefferson Street,

Phoenix, Ariz.,

November 5, 1928.

TO WHOM IT MAY CONCERN:

We herewith assign all moneys now due us or to become due us on Contract for Plumbing on the Phoenix City Hall Job, Phoenix, Arizona, to the STANDARD SANITARY MFG. CO., 447 East Jefferson Street, Phoenix, Arizona, and do herewith instruct the Honorable Commissioners and City Treasurer, City of Phoenix, or other party or parties to whom this is addressed to make payment of said moneys to the above named firm at the address given.

Yours truly,

PHOENIX PLUMBING & HEATING CO.

By C. D. FRANCIS—11–5–1928.

Manager.

WITNESS:

FRANK J. CAMPBELL—11–5–1928.

I. L. NIHELL—Nov. 5–1928. [187]

Respondents' Exhibit "E" for Identification. [187]

[Title of Court and Cause.]

STATEMENT OF EVIDENCE.

BE IT REMEMBERED, that the above-entitled cause came on regularly to be heard before the Honorable R. W. Smith, sitting as a Special Master under an order of reference issued out of this court, and that beginning on November 20, 1929, at the hour of 10 o'clock A. M. in the courtroom of the Referee in Bankruptcy, 315 Ellis Building, Phoenix, Arizona, there being present, either in person or by counsel, the following: Walter J. Thalheimer, Receiver; Miss Alice M. Birdsall, counsel for petitioning creditors; O. E. Schupp, counsel for Leo Francis, one of the alleged bankrupts; E. O. Phlegar, counsel for D. L. Francis and Lyon Francis, two of the alleged bankrupts; Armstrong, Lewis & Kramer, by Frank J. Duffy, counsel for Standard Sanitary Manufacturing Company, intervening creditor; [188] Earl F. Drake, of Townsend & Drake, counsel for Crane Company, intervening creditor; W. H. Hayward, representing United States Department of Justice; and

BE IT REMEMBERED, that the said Master under and by virtue of the authority vested in him

by this Court, did thereupon proceed to hear testimony introduced by the petitioning creditors and by the intervening creditors; and

BE IT REMEMBERED, that Helen Burns was duly sworn as court reporter and

BE IT REMEMBERED, that the counsel for petitioning creditors thereupon called as witnesses the following: Walter J. Thalheimer; Lama Hedgpeth; Mrs. John Dennett, Jr.; Walter S. Wilson; Leo Francis; C. L. Lane; David Montgomery; Charles Asche; Lee Fretz; H. Fliedner; Dee Francis; Leo Francis; Thos. W. Nealon; C. B. Freyberger; Jerrie Lee; Howard O. Workman; W. K. Fetter; Frank McNichol; O. E. Schupp; J. G. Wagner; I. L. Nihell; Dorothy Dorrell; Fred Blair Townsend;

Who being first duly sworn testified in the manner set forth in the following pages:

STIPULATION.

That petitioning creditors were creditors of Phoenix Plumbing & Heating Company in amounts specified in excess of Five Hundred ($500.00) Dollars.

That all three alleged bankrupts were within the requirements of the Act as to domicile, and the jurisdictional time within the County. That principal place of business was in Maricopa County for more than six months prior to date of petition.

The MASTER.—I think from my hasty glance through the pleadings here, that the issues should be clearly defined. You will please define the issues that are to be tried in this proceeding. [189]

Miss BIRDSALL.—The petitioning creditors allege that Leo Francis, Lyon Francis and D. L. Francis are co-partners, doing business under the name of the Phoenix Plumbing & Heating Company, and owing debts in excess of $1,000; that petitioning creditors have accounts for amounts greater than $500 against the same; then the petition sets forth certain acts of bankruptcy, an allegation that the partners are insolvent; that the Phoenix Plumbing & Heating Company and each of said partners are insolvent, and that while insolvent they committed certain acts of bankruptcy, and that each of said alleged bankrupts participated in such acts of bankruptcy.

The first act was on June 6th, when the partnership and members transferred to Crane Co. eight certain accounts which are specified in the petition; that this was done while they were insolvent and with the intent to prefer Crane Co. over other creditors, coming under the second section of the Bankruptcy Act.

Another act of bankruptcy was transferring, at a time subsequent to June 1st, money in the amount of $4,000, and with intent to prefer such creditor.

That on May 7th the alleged bankrupts transferred to the Standard Sanitary Manufacturing Company property enumerated as certain accounts or contracts receivable, covering three different jobs; it is alleged that all of these transfers were made with the intent to prefer these creditors; that they were made while the alleged bankrupts were insolvent and within a period of four months;

it is alleged that none of the instruments by which assignments were made were recorded and with no notice of it being given to creditors. [190]

Another act of bankruptcy is the transfer of money to the Standard Sanitary Manufacturing Company in the amount of $13,000 subsequent to June 1st; another act is that on another date, within four months, the bankrupts transferred $44.50 to the Fred Noll Tire Service, while they were bankrupt.

Now, in answer to that the Standard Sanitary Manufacturing Company has filed an amended answer here setting up or admitting most of the jurisdictional facts; admitting it is a partnership and admitting that all of the alleged acts of bankruptcy were participated in by the members, but averring that the Phoenix Plumbing & Heating Company, at the times mentioned in the petition and at all times up to the filing of the petition, was a solvent, going concern.

Crane Co. answers, putting in issue the same thing. They allege it is a solvent, going concern.

I am not going into the other matters. Lyon and D. L. Francis admit the allegations in regard to insolvency and I think the jurisdictional facts set up that the petitioning creditors owe claims in the amounts alleged, but merely allege that they are not partners in the company; Leo Francis admits the insolvency and admits his willingness to be adjudged a bankrupt, both personally and as the Phoenix Plumbing & Heating Company.

I think that covers the matters that are at issue.

Mr. DUFFY.—There is also the issue of the dates of assignment. We deny the allegations in regard to the assignment of the Lincoln Mortgage Company matter, and we also deny the dates of the assignments in the other cases where it is set up positively that on a certain date the assignment was made. The issues here are, first, the insolvency of the Phoenix Plumbing [191] & Heating Company at any time prior to the date of the petition; and, second, the issue as to these assignments which are set up by Miss Birdsall as acts of bankruptcy. Our contention is that they were not made at the time she sets out in her petition; they were not, in truth and in fact, assignments, and there was no money received by the creditors named under these assignments; the major issue is insolvency, and the other is the dates of these assignments.

Miss BIRDSALL.—I believe the main act is the insolvency at the time alleged; the other matters will come out.

Mr. DUFFY.—Well, I want this clearly understood. This petition in involuntary bankruptcy here sets up that on certain specified dates certain assignments were made at a time when the Phoenix Plumbing & Heating Company was insolvent, and that these assignments constituted preferences and acts of bankruptcy. Now, as I understand it, the burden is on the petitioning creditors to show that at the times and places alleged in the complaint, this concern was insolvent, and that these assignments were made at the dates stated, and that they were within four months prior to the filing of the

petition. I am in a position to prove that some of these things set up were not assigned at all because of the fact that there were prior assignments, and also that the dates of the assignments which are mentioned here were at such times as to be beyond the consideration of this court, and that this court has no jurisdiction over them under this petition here. This is very material in the matter of the Lincoln Mortgage Company, because if it turns out that the Lincoln Mortgage Company assignment was made some six or eight months prior to this petition, this court has no jurisdiction, and this petition must fail by reason of [192] that fact. Therefore the dates of the assignments and the condition of this company at that time are just as important as the solvency of the Phoenix Plumbing & Heating Company.

Miss BIRDSALL.—Referring to Mr. Duffy's own answer, he admits in paragraph III of his answer "that a certain assignment was made on that date."

Mr. DUFFY.—It is true there was one, but not the ones I refer to.

Miss BIRDSALL.—These matters are in the pleadings themselves. So far as the Lincoln Mortgage Company is concerned, there is no allegation made that there was an assignment of the amounts due; there is an allegation in the creditors' petition that about June 1st, or subsequent thereto, these alleged bankrupts transferred a portion of their property, to wit, $13,000.00 in cash, to the Standard Sanitary Manufacturuing Company.

But as I said, I am not going to stipulate as to the issues that may be raised during these proceedings.

The MASTER.—That is what I want in a general way,—the question of solvency or insolvency, the question of the partnership liability on the part of the two alleged partners.

Mr. DUFFY.—There is a clear-cut issue in the matter of the Lincoln Mortgage Company. It is alleged that this was transferred on the 5th of June, and we contend that it was in March,—this question of payment between the Lincoln Mortgage Company and the Standard Sanitary Manufacturing Company.

The MASTER.—Do your answers deny the allegations of assignment [193] made in the petition?

Mr. DUFFY.—So far as the Lincoln Mortgage Company is concerned. We set up that this Lincoln Mortgage Company account was assigned on the 5th of March, and that it then became their property, and the date of delivery is immaterial; the date of the assignment is what counts. And in rebuttal there will be certain other matters in regard to these assignments; there was an assignment on the 7th day of May on these three small jobs, but there is evidence in regard to that.

The MASTER.—I think from the nature of the contentions of counsel that the remainder of the questions involved in the petition will become issues.

Mr. DRAKE.—Crane Co. was served with *subpoena duces tecum* to produce books and records

covering a period of ten months. The first items that were desired related to the account of Crane Co. with the Phoenix Plumbing & Heating Company and these partners, showing the various debits and credits. In response to that subpoena we have here Mr. Wagner, the head bookkeeper and credit man of Crane Co. with an accounts receivable ledger, which is not the original book of entry but the book to which the accounts were transferred; to bring in all the books would mean to bring in about twenty-five volumes; to trace down the original entries would require a week's time so voluminous were the records, not only with these people but with other concerns. This book of secondary entry of accounts receivable showing debits and credits is here. These books of entry in which appear entries of materials furnished for various jobs mentioned here, especially the Lincoln Mortgage Company jobs,— [194] Mr. Wagner says that to trace down these original deliveries or charges for each of these, show the deliveries, etc., would require a single man's time for a period of thirty days. Mr. Wagner is here and can be examined by Miss Birdsall in support of what I have said. If these books are desired, they will be brought in, but we seriously doubt their usefulness because of the fact that entries are scattered through these twenty-five books from day to day over a period of ten months, and if this court is going to attempt to ferret out,— for some reason the materiality of which we do not know,—a fairly accurate statement of the account of Crane Co. as to what job and when delivered,

this court will be in session for thirty days. We stand ready to meet the orders of the court. I could not comply with this subpoena, and I wished to state the reason why.

Mr. DUFFY.—Much the same situation exists with regard to the Standard Sanitary. The accounts involved in the *subpoena duces tecum* go over a long period of time, and we have endeavored so far as possible, to get as complete a record as we could, and we have also gone to the trouble of sending to San Antonio for a master sheet for the period covered by this subpoena, but it is not as complete as could be wished and it is so complicated, we are satisfied that if it is desired to go through these items one by one it would take as long, because they are dealing over a period of years and they had all kinds of jobs. We have all of the jobs here segregated so far as we could. We have been working with the local representatives ever since the subpoena was served and we have here as much as we could get, but there are a number of things which the subpoena asked for which I am satisfied are not material; we want to confine this to the questions at issue if possible.

The MASTER.—That may be determined during the progress of the hearing. [195]

TESTIMONY OF WALTER J. THALHEIMER, FOR PETITIONING CREDITORS.

WALTER J. THALHEIMER, called by petitioning creditors and examined by Miss BIRDSALL, testified:

(Testimony of Walter J. Thalheimer.)

I am Receiver for the Phoenix Plumbing & Heating Company, appointed August 17, 1929, qualified at once, am still Receiver. I have the books of the Phoenix Plumbing & Heating Company from Lee's office. Mr. Leo Francis told me where they were. The books have been in my possession since and are here now.

This is the Ledger of Accounts Payable. (Received and marked Petitioners' Exhibit 1 for identification.)

This is Accounts Receivable. (Received and marked Petitioner's Exhibit 2 for identification.)

Here is Ledger of Contracts Receivable. (Received and marke*t* Petitioners' Exhibit 3 for identification.)

This is Weekly Time Book. (Received and marked Petitioners' Exhibit No. 4 for identification.)

The time book goes back to week ending July 21, 1928; the Accounts Receivable go back quite a ways. I presume they have been carried along; it goes back into 1928. There is an entry on this Contracts Receivable Book of March 14, 1928. On the Cash Book there is a notation as to when the accounts start. On the Accounts Payable the first entry is "April 22, 1929." The notation there says "Forward, April 22."

Witness produces other books as follows:

This is Cash Book or rather receipts and expenses. First entry October 1, 1927. (Received

(Testimony of Walter J. Thalheimer.)

and marked Petitioners' Exhibit 5 for identification.)

Here is another cash book from April 22, 1929, to July 30, 1929. (Received and marked Petitioners' Exhibit 6 for identification.) There is a notation on this "Day after explosion—cash in bank—cash on hand." The entries start [196] from April 22.

Here is check book; first date, May 18, 1929; last one, August 15, 1929. (Received and marked Petitioners' Exhibit 7 for identification.)

Here is another check book. (Received and marked Petitioners' Exhibit 8 for identification.)

Here is book which seems to be entries of different jobs and material that went into that which went back to 1928. I don't think there is anything later than that. It is labor contracts and extras. (Received and marked Petitioners' Exhibit 9 for identification.)

I will produce a deposit book later. I have here a letter written to the Phoenix Plumbing & Heating Company by the Southern Surety Company. (Received and marked Petitioners' Exhibit 10 for identification.)

I have an unsigned contract of assignment dated July 11, 1929. (Received and marked Petitioners' Exhibit 11 for identification.)

I found no live contracts when I took over the books and papers. I made an inventory. The property consisted of plumbing supplies, fixtures and fittings. I don't know the value as no appraisal was made. There were some office fixtures and

(Testimony of Walter J. Thalheimer.)

three auto trucks. On the premises I found typewriters, safe, check protectors, steel filing cabinet, swivel chairs, table, rocker, typewriter stand, ceiling fan, counters, T-square, triangle, etc.; three trucks, Chevrolet, Ford, Star; another truck in possession of Goodman, who claims it under conditional sales contract. The accounts receivable were $6,016.45 according to books. I have tried to collect same since August 17, and have collected only $235.32. Many people say [197] the accounts are paid, others that the accounts are not correct, claiming they owe less amount, etc. I don't know actual value of accounts. Only one out of ten have answered my demand letters. I find no credits on books as claimed by people. I don't think accounts are worth $6,000.00 by any means. Contracts receivable on books amount to $44,898.91. Some have been taken over by bonding companies before I was appointed. I collected $97.61 from Hogan & Farmer. That's all I have collected. The Bachowetz apartments contract is included in $48,000 scheduled and shows on the books for $3,700.00. I know the first mortgagee has brought suit to foreclose the mortgage. He made me a party to action. The Bachowetz account, from the records, is a total loss. (Witness produces check stub and bank-book which is received and marked Petitioners' Exhibit 12 for identification.)

TESTIMONY OF LAMAR HEDGPETH, FOR PETITIONING CREDITORS.

I am Deputy County Recorder of Maricopa County. I have here book 2 of Partnerships, of Maricopa County, State of Arizona, on page 144 there is the following:

"Certificate of Co-partnership

"We, the undersigned, do hereby certify that we are partners, transacting a general plumbing business in the city of Phoenix, Arizona, under the fictitious name and style of Phoenix Plumbing and Heating Company. That the principal place of said business is at #316 North 6th Avenue, Phoenix, Arizona, and that the names in full of all the members of said partnership and their respective residences, are as follows, to-wit:

Dee L. Francis 88 Mitchell Drive, Phoenix, Ariz.

Leo Francis 1109 Diamont St., Phoenix, Ariz.

Lyon Francis 14 South 20th Ave., Phoenix, Ariz.

"IN WITNESS WHEREOF, we have hereunto set our hands and seals this 27th day of December, 1928.

"D. L. FRANCIS.
"LEO FRANCIS
"LYON FRANCIS. [198]

"State of Arizona,

"County of Maricopa,—ss.

"Before me, Harry F. Bringhurst, a Notary Public in and for the County of Maricopa, State of Arizona, on this day personally appeared Dee L. Francis, Leo Francis and Lyon Francis known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same for the purpose and consideration therein expressed.

"(Seal) HARRY F. BRINGHURST,

"Notary Public.

"My commission expires: June 12, 1931.

"Filed and recorded at the request of C. F. Dains, December 28, 1928, at 3:12 P. M."

Turning to index of letter "P" and reading index into record. (Witness reads all of index under letter "P," showing only one Phoenix Plumbing & Heating Company reference.) The index gives the names of the individuals after Phoenix Plumbing & Heating Company: "D. L., Leo & Lyon Francis, p. 144–43452." I have read all that index of "P's" and that record is of partnerships. The first entry in this book is April 20, 1922, and the last is March 22, 1929. It covers the record of partnership to date. The book is not full.

I have book 7 of Mechanics' Liens, Maricopa County, Arizona; on page 596 is Phoenix Plumbing & Heating Company vs. Walter Bachowetz & Rose B., his wife.

(Testimony of Lamar Hedgpeth.)

"Labor and Material Men's Lien."

A. (Reading:)

"Phoenix Plumbing & Heating Company vs. Walter Bachowetz and Rose Bachowetz, his wife.

"NOTICE AND CLAIM OF LIEN.

"State of Arizona,

"County of Maricopa,—ss.

"The Phoenix Plumbing & Heating Company (a co-partnership) by Leo Francis, Manager, being first duly sworn, deposes and says:"—

A. (Reading:) Signed "Phoenix Plumbing & Heating Company, by Leo Francis, Manager.

"Subscribed and sworn to before me this 2nd day of July, 1928. [199]

"(Seal) MARJORIE KINGSBURY,

"Notary Public.

"My commission expires January 29, 1929."

A. (Reading:) "Filed and recorded at the request of Phoenix Plumbing & Heating Company, July 3, 1928, at 2:46 P. M."

It is in amount of $2,560.52. On page 577 of Book 7, of Mechanics' Liens is the following:

A. (Reading:) "Labor and Material Men's Lien. Phoenix Plumbing & Heating Company vs. J. W. Walker.

"NOTICE AND CLAIM OF LIEN."

A. (Reading:) "Phoenix Plumbing & Heating Company, by D. L. Francis, owner and manager, being first duly sworn, deposes and says"—

(Testimony of Lamar Hedgpeth.)

A. (Reading:) Signature "Phoenix Plumbing & Heating Company by D. Francis, Manager."

A. (Reading:) "Subscribed and sworn to before me this 7th day of June, 1928.

"(Seal) ETHEL McKISSICK.

"My commission expires May 25, 1932."

It is filed and recorded at the request of Phoenix Heating & Plumbing Company, on June 7, 1928, at 3:18 P. M. The amount of the claim is $202.60
Paid by J. W. Walker 144.50
Balance unpaid and due .....$ 58.10

In Book 8 of Mechanics' Liens, page 55, is:

A. (Reading:)

"Laborer & Material Men's Lien.

"Phoenix Plumbing & Heating Company vs. Laing & Heenan, Builders, and Duffy & Payne, Realty Company, owners.

"NOTICE AND CLAIM OF LIEN." [200]

A. (Reading:) "Phoenix Plumbing & Heating Company (a co-partnership), being first duly sworn"—and signed—

A. "Phoenix Plumbing & Heating Company by Paul E. Gehres, Asst. Manager."

A. (Reading:) "Subscribed and sworn to before me this 1st day of October, 1928. J. D. Brush, Notary Public. (Seal) My commission expires 4-14-32."

A. "Filed and recorded at the request of Phoenix Plumbing & Heating Company, October 1, 1928, at 4:40 P. M." Book 8, page 146, Mechanics' Liens contains the following:

A. (Reading:)

(Testimony of Lamar Hedgpeth.)

"Notice and Claim of Lien.

"Phoenix Plumbing & Heating Company vs. Mrs. Nannie McFall. Phoenix Plumbing and Heating Company (a co-partnership) by D. Francis, Manager"—

A. Signed "Phoenix Plumbing & Heating Company, a co-partnership by D. Francis, Manager."

A. "Subscribed and sworn to before me this 21st day of February, 1929.

"(Seal) MARJORIE K. SMITH,

"Notary Public.

"My commission expires Jan. 31, 1933."

A. "Filed and recorded at the request of the Phoenix Plumbing & Heating Company, on February 21, 1929, at 3:31 P. M."

TESTIMONY OF MRS. JOHN DENNETT, JR., FOR PETITIONING CREDITORS.

(Examination by Miss BIRDSALL.)

I am Louise Gage Dennett, Clerk, Board of Education, and am custodian of contract between High School District and Phoenix Plumbing & Heating Company, a co-partnership, dated September 5, 1928, which I have here. [201]

(Contract in Evidence, Ex. No. 1, Petitioning Creditors.)

Certified copy substituted by stipulation.

B–522

PETITIONERS' EXHIBIT No. 1.

In Evidence.

11–20–29.

PLUMBING CONTRACT.

THIS AGREEMENT made and entered into this the 5th day of September, 1928, by and between D. L. Francis, Leo Francis and Lyon Francis, all of Phoenix, Arizona, a co-partnership, doing business under the firm name of Phoenix Plumbing and Heating Company, hereinafter designated the Contractors, the first party, and Phoenix Union High School District, Maricopa County, Arizona, by its Board of Education, hereinafter designated the Owner, the second party, WITNESSETH:

That in consideration of the covenants and agreements herein contained to be and by them kept and performed, it is hereby agreed by and between the parties above named as follows, to-wit:

1. The Contractors, to the satisfaction and under the direction of the Owner and Fitzhugh and Byron, the Architects for the Owner, Shall and will provide all the material and perform all the work to install the plumbing in the Junior College Building, in accordance with the drawings and specifications prepared therefor by Fitzhugh & Byron, architects, which drawings and specifications, signed for identification by the parties hereto are hereby declared to be a part of this contract.

2. The Architects shall furnish to the contractors

such further drawings or explanations as may be necessary to detail and illustrate the work to be done, and the contractors shall conform to the same as far as they may be consistent with the original drawings and specifications referred to and identified as provided in paragraph 1.

3. Should the Owner at any time during the progress of [202] said work require any alterations in, deviations from, additions to, or omissions from the said contract, specifications or drawings, it shall have the right and power to make such change or changes, and the same shall in no way effect or make void this contract, but the difference in the work omitted or added shall be deducted from or added to the amount of the contract. No work of any description shall be considered extra unless a separate estimate in writing of the same, before its commencement, shall have been submitted by the contractors to the Owner and Architects, and their signatures obtained thereto. Should any dispute arise respecting the true construction or meaning of the drawings or specifications, or respecting the true value of any work to be omitted or added, the same shall be decided by the architects in charge, and their decision shall be final and conclusive, subject to arbitration as provided in the General Conditions of the Specifications.

4. The work embraced in this agreement shall be executed under the immediate charge of, and under the sole responsibility of said contractors until said work be fully and finally completed and delivered to and accepted by the Owner and its

Architects and the contractors shall assume responsibility for any damage which may occur to the building or materials during the work of this contract, except that the owner will carry fire insurance as hereinafter provided. The said contractors shall be responsible for any and all damage to persons and property during the performance of said work occasioned by his own act or neglect or that of any of his employees. The said contractors shall hold the said Owner harmless and free from expense or loss of any and every nature which may result from injury or damage sustained by any person or persons or damage to any property of any and all kinds which may result from any claim or claims, suit or suits, of any and every nature, as a result of the said contractors carrying on the work herein provided for. The Contractors shall carry from the time of the beginning [203] of their operations until the completion of the same, approved employer's liability insurance to cover all claims for injuries to their employees engaged in said work.

5. The Owner shall have the said building insured after its walls and superstructures are started, and shall from time to time increase such insurance as the work progresses, and the said policy shall have a clause showing the contractor's rights to such portion of the insurance as their interest may appear. The contractors shall assume all responsibility for materials on the ground.

6. Said contractors shall pay all workmen the wage scale prevailing in the community and shall in all respects, in the performance of the work of

this contract, observe the laws of the said State, especially a certain statute, being Chapter 1, Title XIV, of the Arizona Civil Code, 1913, and shall protect and save harmless said Owner, its officers and agents, from liability or loss on account of any violation of any laws of Arizona in the performance of the work of this contract.

7. The contractors shall provide sufficient, safe and proper facilities at all times for the inspection of the work by the Architects. They shall within twenty-four hours after receiving written notice from the Architects to that effect, proceed to remove from the grounds or the building all materials condemned or rejected, whether worked or unworked, and to take down all portions of the work which the Architects shall by like written notice condemn or reject as unsound or improper, or as in any way failing to conform with the drawings and specifications.

8. Should the contractors refuse or neglect at any time to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to [204] prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect, or failure being ascertained by the Architects, the Owner shall be at liberty after two days' written notice to the contractors, given through the Architects, to provide any such labor or materials and to deduct the cost thereof from any money then due or thereafter to become due to the contractors under this con-

tract; and in the case of the discontinuance of the employment of the contractors, they shall not remove any appliances or materials from the grounds or building, neither shall they be entitled to receive any further payment under this contract until the work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the owner in finishing the work, such difference shall be paid by the Owner to the contractors; but if such expense shall exceed such unpaid balance, the contractors shall pay the owner the difference.

9. Should the contractors be obstructed or delayed during the prosecution of or completion of the work by the act, neglect, delay, or default of the Owner or the Architects, or by any damage which might happen by fire, lightning, earthquake, or cyclone, or by the abandonment of the work by the employees through no fault of the contractors, then the time herein fixed for the completion of the work, shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid, but no such allowance shall be made unless a claim therefor is presented to the Architects within forty-eight hours of the occurance of such delay, and the duration of such extension shall be certified by the Architects and a copy thereof furnished the owner and the contractors. Until said building is completed, the contractors shall work in co-operation with any other contractors, or other persons [205] engaged in the proper furnish-

ing of labor and materials, or the installation of any fixtures for or in the said building.

10. The contractors agree that they will perform the work of this contract expeditiously as fast as the building is ready to receive it and will complete all work within 130 working days from the date of this contract.

11. Upon the faithful performance by the contractors of all the conditions and requirements of this agreement, the Owner hereby agrees and promises to pay to the said contractors, the sum of Eight Thousand, Four Hundred, Twenty-four and no/100 Dollars ($8,424.00).

All payments to be made upon estimates and certificates of the Architects upon the first and fifteenth days of each month for seventy-five (75%) per cent of the amount of labor and material having entered into the building and materials having been delivered on the site since the preceding payment, the final payment of twenty-five (25%) per cent reserved from previous estimates or installment payments shall be made as soon after completion of the building as the contractors shall furnish satisfactory evidence that all claims against the building have been satisfied. The contractors shall promptly pay all sub-contractors, material men, labors, and other employees as often as payments are made to them by the owner, and shall as a condition of any such partial payments, if required, furnish to said owner satisfactory evidence that all sub-contractors, material men, laborers, and other employees upon said building, have been fully paid up to such time and shall deliver said

work free from any claims on account of such sub-contractors, material men, laborers or other employees, and in the event of their failing at any time to pay such claims, the owner may retain from all subsequent estimates and pay [206] over to such sub-contractors, material men, laborers and other employees, such sums as may from time to time be due them respectively. No certificate given or payment made under this contract, except the final certificate of final payment, shall be conclusive evidence of the performance of this contract either wholly or in part, and no payment shall be construed to be an acceptance of defective work or improper material. Nothing herein contained shall be construed as an undertaking on the part of the Owner to be responsible to any material men, laborers, or sub-contractors on account of any material furnished or labor performed upon said building in any amount whatsoever. Before final settlement is made, the contractors shall furnish satisfactory evidence to the owner that the work covered by this contract is free and clear from all claims for labor or material, and that no claim then exists for which liens could be enforced or filed if said building were owned by a private individual.

12. This Contract shall not be in force or effect until the contractors shall execute a bond for the faithful performance of this contract in the penal sum of Eight Thousand, Four Hundred, Twenty-four and No/100 Dollars ($8,424.00) with Surety Company satisfactory to the Owner.

13. It is covenanted and agreed between the parties hereto for themselves, their administrators, executors, successors and assigns, that this contract and all its terms and provisions shall be final and binding upon them and each and every one of them.

IN TESTIMONY WHEREOF, the said Contractors have hereunto affixed their signatures and the Owner has caused this agreement to be subscribed by its Board of Education, the day and year first hereinabove mentioned.

PHOENIX PLUMBING & HEATING CO.
LYON FRANCIS,
LEO FRANCIS,
D. FRANCIS,
Contractors. [207]

PHOENIX UNION HIGH SCHOOL DISTRICT.
By BOARD OF EDUCATION,
_____,
President.
LOUIE GAGE DENNETT,
Clerk,
Trustee.

BOND.

KNOW ALL MEN BY THESE PRESENTS: That we, D. L. Francis, Leo Francis and Lyon Francis, as principals, and AMERICAN BONDING COMPANY OF BALTIMORE organized and existing under the laws of Maryland duly authorized to do business as a surety company and to become surety upon bonds in the State of Arizona,

as surety herein, are held and firmly bound unto Phoenix Union High School District, of Maricopa County, Arizona, in the penal sum of Eight Thousand, Four Hundred, Twenty-four and No/100 Dollars ($8,424.00) gold coin of the United States of America, to be paid said School District, to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seal and dated this 5th day of September, 1928.

THE CONDITION of this obligation is such that:

WHEREAS, under and by virtue of a certain agreement in writing entered into on the 5th day of September, 1928, by and between the above bounden principals, D. L. Francis, Leo Francis and Lyon Francis, and the said Phoenix Union High School District, whereby, in consideration of the payment to the above bounden principals of a certain sum of money, the said principals agree to provide all the materials and perform all the work mentioned in the specifications and shown upon the drawings prepared by Fitzhugh & Byron for the installation of a plumbing system, to the satisfaction and under the direction of said Architects, [208] in the Junior College Building for the said Phoenix Union High School District, excepting, however, that said work might deviate from said plans and specifications and be subject to changes thereto in the manner provided in said contract, a copy of which said contract is hereto

attached and by reference made a part of this bond as though fully and completely written therein.

NOW, THEREFORE, if the above bounden D. L. Francis, Leo Francis and Lyon Francis, their heirs, executors, administrators, successors or assigns, or either of them, shall well and truly perform all of the agreements of the said contract to be performed upon their part in the manner and form and at the time stated and specified in said contract, then this obligation shall be void; otherwise to be and remain in full force and virtue.

PHOENIX PLUMBING & HEATING CO.

LYON FRANCIS,
LEO FRANCIS,
D. FRANCIS,
Principals.

AMERICAN BONDING COMPANY OF BALTIMORE.

By M. KINGSBURY SMITH, (Seal)
Attorney-in-fact,
Surety.

I, J. W. Laur, of the State of Arizona, County of Maricopa, hereby certify that the above is a true and exact copy of the original contract between the Phoenix Plumbing and Heating Company and the Phoenix Union High School District.

J. W. LAUR.

Subscribed and sworn to before me, a Notary Public, of the State of Arizona, County of Maricopa, on this day, November 19, 1929, at Phoenix, Arizona.

P. S. BASSFORD,
Notary Public. [209]

(Testimony of Walter S. Wilson.)

B.–522.

PETITIONERS' EXHIBIT No. 1.
In Evidence.
11–20–29.

Endorsed on back of exhibit:

Report of Special Master. Filed Feb. 18, 1930. C. R. McFall, Clerk. United States District Court for the District of Arizona. By H. F. Schlittler, Deputy Clerk. [210]

TESTIMONY OF WALTER S. WILSON, FOR PETITIONING CREDITORS.

(Examination by Miss BIRDSALL.)

I am Clerk, Superior Court, Maricopa County. I have here records in case No. 28535, Phoenix Plumbers Supply Company et al. vs. W. J. Bachowetz et al., and a complaint in intervention by Phoenix Plumbing & Heating Company, filed December 28, 1928, in which Phoenix Plumbing & Heating Co. is designated a co-partnership composed of D. L., Leo, and Lyon Francis. The verification by Dee L. Francis is as follows: (Reading:)

"State of Arizona,
County of Maricopa,—ss.

Dee L. Francis, being first duly sworn, upon oath deposes and says that he is one of the members of the co-partnership known as the Phoenix Plumbing & Heating Company; that he makes

this verification for and on behalf of said co-partnership, being duly authorized so to do; that he has read the foregoing complaint in intervention and knows the contents thereof, and that the matters and things therein stated are true of his own knowledge except as to the matters and things stated upon information and belief, and as to these, he believes them to be true.

DEE L. FRANCIS.

Subscribed and sworn to before me this 28th day of December, 1928.

(Seal) MARJORIE KINGSBURY,
Notary Public.

My commission expires January 29, 1928.

TESTIMONY OF LEO FRANCIS, FOR PETITIONING CREDITORS.

(Examination by Miss BIRDSALL.)

I am Leo Francis, aged 25. I filed schedules as a [211] bankrupt. I turned books to Mr. Thalheimer, and some books were not shown to him as they were previous to April 21, 1929. We had bookkeeper for books. About 21st of April, 1929, we had a blow-up in shop, and some books and records were destroyed. We had a bookkeeper named Fretz, who started work May or June. Paul Gehres was a bookkeeper before that and at the time the books were destroyed. Fryberger was manager and employed at same time Fretz was.

TESTIMONY OF C. L. LANE, FOR PETITIONING CREDITORS.

(Examination by Miss BIRDSALL.)

I am assistant cashier, Commercial National Bank. The bank had dealings with Phoenix Plumbing & Heating Company. I have record of their checking account and borrowings. They began borrowing October 22, 1927. The note was signed Phoenix Plumbing & Heating Company by D. Leo Francis; all notes have been signed D. Leo or D. L. Francis. In October, 1927, the loan was $200.00. Running along from that time loans were continually made by Commercial National Bank at different periods. On 30th of April, 1929, the amount*ing* owing to the Bank was $6,000.00; on August 17, 1929, the amount due was $6,100.00 and interest. We are a creditor at the present time for that amount. I have statement dated October 15, 1927, made by the Phoenix Plumbing & Heating Company for the purpose of obtaining credit from the Bank, the first one made to us. It is signed D. Leo Francis. Dee Francis is the man who signed it. Statement produced as:

(Petitioning Creditors' Exh. 2 in Evidence.) [212]

B.–522.

PETITIONERS' EXHIBIT No. 2.

In Evidence.

11–20–29.

NAME—D. Leo Francis.

KIND OF BUSINESS—Plumbing & Heating.

ADDRESS—316 North 6th Ave., Phoenix, Arizona.

Phoenix Plumbing & Heating Co.

INDIVIDUAL OR PARTNERSHIP STATEMENT.

To the Com'l Nat. Bank. Bank of Phoenix, Ariz.

For the purpose of obtaining credit with you from time to time I herewith submit the following as being a fair and accurate statement of my financial condition on Oct. 15, 1927.

ASSETS.

Cash on hand and in bank.....	258.54
Notes Receivable	
(Give due dates and details of important items on reverse)	
Accounts Receivable	1056.00
(Give full details of important items on reverse)	
Salable Merchandise (How valued	3700.00
United States Government Securities.....	
(.....Horses @.....	
Live (.....Cattle @.....	
Stock (.....Sheep @.....	
(.....Hogs @.....	

Estimated Value Growing Crop.
Acres. Crop. Yield. Price. Total.

Total Quick Assets.....5014.54
Real Estate (List on reverse).....
Machinery and Tools (Actual value) Inventory and office fixtures—3 Trucks...2500.00
2–F C A Rs
Other Stocks and Bonds (List on reverse)
Other Assets (Describe) .....

Total 7514.54

[213]

LIABILITIES.

Notes Payable, to banks.....
(Give due dates and details on reverse)
Other Notes Payable .....
(Give due dates and details on reverse)
Open Accounts Payable .....
Chattel Mortgages on (Not legible).....
due .....192.... 2670.00
Other indebtedness .....
(Give full details on reverse)

Total Current Debts.....2670.00
Mortgages or Liens
on Real Estate, due.....192....
.....
Total Liabilities 2670.00
Net Worth 4844.54

Total 7514.54

(Testimony of C. L. Lane.)

Liability as endorser for others $———

Are any of the above assets pledged to secure indebtedness ———

Life Insurance carried—$10000.00. Payable to—Wife.

Fire Insurance on personal property—$1000.00, On buildings—$——— Do you carry Employers' Liability Insurance? Yes.

Are any suits or litigation pending either for or against firm? No. Details ———

Signed—D. LEO FRANCIS.

(Over) [214]

I have a statement dated April 2, 1928, signed by Leo Francis.

B.–522.

PETITIONERS' EXHIBIT No. 3.

In Evidence.

11–20–29.

NAME—Phoenix Plumbing & Heating Co.

KIND OF BUSINESS ———

ADDRESS—316 N. 6th Ave.

INDIVIDUAL OR PARTNERSHIP STATEMENT.

To the Com'l Nat. Bank. Bank of Phoenix, Arizona.

For the purpose of obtaining credit with you from time to time I herewith submit the following as being a fair and accurate statement of —— financial condition on April 2, 1928.

ASSETS.

Cash on hand and in bank	1758.50
Notes Receivable	
(Give due dates and details of important items on reverse)	
Accounts Receivable	2878.20
(Give full details of important items on reverse)	
Salable Merchandise (How valued.....)	8700.00
Contracts as attach list	19012.10
United States Government Securities	
Live Stock (.....Horses @	
(.....Cattle @	
(.....Sheep @	
(.....Hogs @	

Estimated Value Growing Crop.

Acres	Crop	Yield	Price	Total

Total Quick Assets	32348.80
Real Estate (List on reverse)	
Machinery and Tools (Actual value)	1400.00
Other Stocks and Bonds (List on reverse)	
Other Assets (Describe)	
Total	33348.80

[215]

LIABILITIES.

Notes Payable, to banks	1350.00
(Give due dates and details on reverse)	
Other notes Payable	
(Give due dates and details on reverse)	
Open Accounts Payable	3970.00

(Testimony of C. L. Lane.)

Chattel Mortgages on 1701.00
due .....192....
Other Indebtedness. .....
(Give full details on reverse)
For Labor and Material to finish Contract
work 14200.00

Total Current Debts....21221.00
Mortgages or Liens on Real Estate,
due .....192....
Total Liabilities.....21221.00
Net worth 12127.80

Total 33348.80

Liability as endorser for others—$ None.
Are any of above assets pledged to secure indebtedness? None.
Life Insurance carried—$11500.00. Payable to—Parents.
Fire Insurance on personal property—$2,000.00. On buildings—$ None. Do you carry Employers' Liability Insurance? Yes.
Are any suits or litigation pending either for or against firm? None. Details. ———.

Signed—LEO FRANCIS.

(Over) [216]

In June and July, 1929, Fretz submitted figures on firm standing and brought the books and we went over them together.

There were two statements made up by Fretz, one dated June 20th and one June 22d. Net worth in statement $5,718.79; contracts receivable $47,-

(Testimony of C. L. Lane.)

400.64. This statement was found incorrect and we drew up another. On July 20th, figures were furnished by Nihel of Standard Sanitary Co. as to material needed and Fryberger, manager of Phoenix Plumbing & Heating Co. as to labor needed to finish contracts receivable, and I drew up statement.

Mr. Fretz and I went over the books, checks, cash on hand; the inventory figures were furnished by Mr. Fryberger. Some figures were furnished by Mr. Nihel of the Standard Sanitary and by Mr. Fryberger, who was then manager. Mr. Fretz and I drew up schedules to show the total amount due, and he and Mr. Fryberger gave me the estimates of the amounts to complete the jobs.

I have Dunn's Report of August 18, 1928, which shows Phoenix Plumbing & Heating Company as a co-partnership.

(Received and marked Petitioner's Exhibit No. 4 in Evidence.) [217]

B.–522.

PETITIONERS' EXHIBIT No. 4.

In Evidence.

11–20–29.

IMPORTANT—Note if NAME, BUSINESS and ADDRESS correspond with your inquiry.

Rv.

PHOENIX PLUMBING & HEATING COMPANY (NOT INC.)

PHOENIX, ARIZONA,
Maricopa County,
316 N. 6th Ave.

Plbg. & Heating Contrs.

D. L. Francis, aged 34, married.
Lyon Francis, aged 23, married.
Leo Francis, aged 22, married.

(Y) Cond. 24200 August 18th, 1928.

RECORD.

This business was started a number of years ago by another however, on October 1, 1927, Leo Francis succeeded to same and for a time he operated individually although the above are now given as owners. The Francis family came from Fort*h* Smith, Ark., where they were identified with the same line, although for a time, Leo Francis was at Kanowa, Okla., where he was known as a solicitor.

STATEMENTS.

A statement as of October 1, 1927, furnished by Leo Francis over his signature, and showing him-

self as the owners of the business included total assets of $7,520, liabilities $2,670, and surplus $4,850.

A statement from actual inventory of May 31, 1928, signed Phoenix Plumbing & Heating by Paul E. Gehree, cashier, is now furnished, same showing the above as partners and financial condition as follows:

ASSETS.		LIABILITIES.	
Mdse. on hand.....	6,042.95	For Mds. not due...	7,195.36
Outstanding Accts..	2,642/78	Loans from bank...	4,000
Notes Recv.	283.40	Int. Cont. Payable..	1,845.08
Cash on hand & Bk.	1,684.38	Cap. Investment Accts.	15,236.55
Machy. Fixts. Etc..	2,244.75		
Deposits on plans & Bids	1,138		
Due on contracts...	14,300.73		
	$28,276.99		$28,276.99

Insurance on merchandise—$1,800. On machinery and fixtures—$500. Annual rent—$636. Annual sales (Estimated)—$120,000.

GENERAL INFORMATION.

The present statement shows considerably increased assets in comparison with the one of October, 1927, however since latter date, a good business has been done and some progress is conceded. As noted, they have quite a large amount due on contracts, as well as outstanding accounts and while total liabilities are large, they are not regarded as out of propportion to their total assets. The

owners maintain good banking connections, carry a fair balance there usually, and have been extended accommodations at times. Affairs are capably managed, those interested are well regarded, they have done well as stated, having handled a number of large contracts since their business was established.

FIRE HAZARD: The building occupied is a one-story building, the front being of cement block while the rear is of frame [218] and *and* sheet iron. On one side and close is a brick residence, while on the other side and on a corner, is a two-story brick building. The lower floor is occupied by a grocery, bakery, and restaurant, while the second floor is used as a rooming-house.

TRADE REPORT

HC ORDER	OWE	DUE	PAYS
3500			Prompt
688			Discount

FIRE RECORD

None.

Y–8–18–28 (CCO)

BK. CN. N. Q. to G 3

T. R. (24200–SSMCO–5495) [219]

(Testimony of C. L. Lane.)

RESPONDENTS' EXHIBIT "A" FOR IDENTIFICATION.

(COPY.)

PHOENIX PLUMBING AND HEATING COMPANY.

June 22, 1929.

ASSETS:		
Cash on Hand	$2037.45	
Cash in Bank (Overdraft)	907.54	$ 1129.91
Contracts Receivable		47400.64
A/C Rec. Since Jan. 1, 1929		2327.96
A/C Rec. Prior Jan. 1, 1929		1562.02
Due from Others		850.00
Inventory		5000.00
		$58270.53
LIABILITIES:		
Accounts Payable	$46,451.74	
Notes Payable	6,100.00	
Net Worth	5,718.79	
		$58270.53

[220]

Later in July conference was held in Adams Hotel; present Leo Francis, Mr. Norris, Stahl, Mr. Fretz and myself. Leo Francis said firm was partnership, that he and his two brothers divided profits. I never saw contract of assignments dated July 11, 1929, signed by Phoenix Plumbing & Heat-

(Testimony of C. L. Lane.)

ing Company, a form of assignment to Mr. Fryberger.

Cross-examination by Mr. DUFFY.

Referring to Respondents' Exhibit "A" for identification, this is statement of accounts receivable and payable, part of statement on June 22, 1929.

Phoenix Plumbing & Heating Company owed Bank $6,000 on April 30, 1929, later we made more loans. On May 15, $1,000, and May 22, they loaned $2,000. The total loan was $6,100. In May we loaned $3,000.00, but some payments had been made. At close of business May 1st their checking account showed $802.90, and on May 15, $1,465.74, May 22d, $542.46. The loan committee passed on loans. Sometimes loans are made without O. K. of loan committee. I don't know if committee passed on May loans. I am Assistant Cashier. There is no hard-and-fast rule about loan committee passing on loans. It is up to person making loan. No limit on officer making loan if good collateral is put up. I don't know whether application for $2,000 with only a statement would go to loan committee. Would depend on credit of applicant. Up to May 22, the bank loaned Phoenix Plumbing & Heating Company in various amounts. My loan sheet does not show who passed on loan of May 15th. We ordinarily have application form which is then O. K.'d by loan committee. I don't know if there is a loan sheet on loan of May 22d. I have here financial file. There is [221]

(Testimony of C. L. Lane.)

usually a slip attached to note when it is fixed up. The loan of $6,000 was reduced and increased so that on August 17, 1929 they owed $6,100; that was done by payment of $1,000 on May 9th, and an increase in loan of $2,000 on May 15th; increased another $1,000 and reduced $1,000 on June 3d—$900 on June 5th. I don't know how payments were made. I having nothing to do with them. (Stipulated that witness should go back to bank and look for loan application, with understanding that if he could not find it, he need not return, but if found he would return as witness of intervening creditors.)

(Examination by Miss BIRDSALL.)

Q. In regard to this statement of July 20th,—there is a statement here of assets; how were those assets arrived at? I don't think that was made clear; they were made from an examination of the books of the Phoenix Plumbing & Heating Company? A. Yes. Here is cash on hand, $150.

Q. That was taken from the books of the Phoenix Plumbing & Heating Company? A. Yes.

Q. What was the accounts receivable total?

A. Accounts receivable taken from the books, $5,935.92; contracts receivable, $45,119.20; inventory, $4,850.00; this figure was furnished by Mr. Fryberger.

Mr. DUFFY.—I object to this witness testifying to that. This isn't the proper way to bring this evidence in; I object to his testifying as to what was furnished him by other people. (Argument by counsel.)

(Testimony of C. L. Lane.)

The MASTER.—The objection is sustained.

(Exception by Miss BIRDSALL.)

Q. Now then, coming to the accrued salaries, where was that taken from?

A. Mr. Fretz gave me that—I imagine from his pay-roll.

Q. What is the amount of it? [222]

A. $107.50—that is accrued salaries. The next pay-roll was for the week ending June 20, 1929,

Q. Where did that come from?

A. Mr. Fryberger,—$550.

Q. What is the next item?

A. Estimated labor to complete contracts.

Q. Who furnished that figure?

A. Mr. Nihel and Mr. Fryberger together. I drew up a schedule of the contracts receivable, showing the total of amounts paid and left a column for the amount of labor and material, and Mr. Fryberger and Mr. Nihel furnished the figures on each job.

Mr. DRAKE.—I want to be clear as to how far Crane Co. is concerned,—that that is not binding upon us. You want to avoid having it read into the record, but we have a chance to object.

(Argument by counsel.)

Q. Will you state then, please, the circumstances under which Mr. Nihel made up that estimate?

A. There were a number of conferences,—

Q. He came to your bank? A. Yes.

Q. Why did he come?

A. Well, we could see things were in bad shape,

(Testimony of C. L. Lane.)

and we wanted if we could to work it out for the best interests of all concerned. * * * [223]

On June 20th, Saturday afternoon, Nihel of Standard, Norris and one or two of creditors, Fretz and Fryberger, met and it was agreed that books should be brought to bank on Monday and that we would check over books and see what these contracts should be listed for, how much money and material it would take to finish them.

The estimates was made by these two, Fryberger and Nihell, after a number of conferences. It was agreed that the estimate should be made up to show true conditions and that all should help to straighten it out. Nihel asked how much labor was necessary. Fretz decided how many days it would take to finish for purpose of ascertaining amount of liability of company at that time. I have a copy of memo showing notation of meeting. Notes payable to banks compiled from my record. Accounts payable from books of Phoenix Plumbing & Heating Company. Figures on Accounts payable to Standard Sanitary were furnished from Nihel. Phoenix Plumbing & Heating Company books did not show amount due Standard Sanitary Company.

Recross-examination by Mr. DUFFY.

Conferences were to find out true condition of Company. Nihel was urging the need of creditors helping company over difficulties. Nihel did not say they were a going concern at all conferences. He might have said that at one time. Figures

(Testimony of C. L. Lane.)

were compiled to find out exact condition of firm. No one ready to step forward with money to help them. I spent a lot of time over it. Mr. Morris was there Sunday afternoon, not during week. Mr. Korrick was there. He is a director. He was there on Saturday. Stahl was not there. I can't say that Mr. Korrick did not say, "The Commercial National Bank will not stand by, but you stand by, or we'll put them into Bankruptcy." I don't know what Nihel and others had in their minds. [224] It was patent that Phoenix Plumbing & Heating Co. was insolvent. The reason for preparing statement was that I was directed by bank officials to find out exact condition of Phoenix Plumbing & Heating Company. I know they were insolvent, definitely, on July 20, but had reason to believe it before. On figures furnished by Mr. Fryberger, insolvence was established.

Redirect Examination by Miss BIRDSALL.

The figures on statement show them insolvent. Nihel did not say concern was solvent on July 20th. He said at that time we would be lucky if we got so many cents on the dollar.

TESTIMONY OF DAVID MONTGOMERY, FOR PETITIONING CREDITORS.

(Examined by Miss BIRDSALL.)

I am Chief of Police, city of Phoenix. I have here Police Record for April, 1929, (reading) which shows safe 316 N. 6th Ave. blown at 9:15

(Testimony of H. E. Green.)

P. M. by thugs. Fire department called. Later officers Greene and Asche brought in evidence of attempted arson at same address.

TESTIMONY OF H. E. GREEN, FOR PETITIONING CREDITORS.

(Examined by Miss BIRDSALL.)

I am a patrolman, Police Department, City of Phoenix. On April 21, 1929, I was on Five Points beat, which includes 316 North Sixth Avenue. In early morning on that date fire alarm on Sixth Avenue and Van Buren was turned in. I heard explosion, located it and waited for fireman. It was 316 North Sixth Avenue. I went in and found that there had been an explosion; the door, all the inside of the place had been blown to pieces. If there was any fire, the force of the explosion had put it out. Before the fire-alarm, I had checked the safe, as is customary, from the window. The safe door was shut. When I went back with fireman, the safe door had been wrenched from its hinges and the safe moved three or four feet toward the south from its original position. We had trouble [225] with the curious and in finding owners of place. One window on alley was shattered; it was covered with fine mesh screen. One window in front door was broken. On north of door was a low partition fixed like interior of bathroom. Splinters were driven through that. Apparently roll-top desk had been splintered. I couldn't tell what was on floor, piles of paper blown

(Testimony of H. E. Green.)

to atoms, and dust over everything. I stayed all night. Proprietors came in later; there is one (pointing to D. Francis in courtroom). Everything was intact in the safe. Early in the morning Asche of the Merchants' Patrol met me at Five Points. He assisted me in my investigation. We went in and examined the safe; thought it was a safe job. We found no soap. We found a bookshelf on the south side of the building, under which was the safe. There, under the shelf, was a box sixteen inches square by one and one-half inches high. In the corner was a candle about two inches high, partly burned. On the south side of the door was a long pipe framework, and under this an empty five-gallon can pretty well bent. On the floor some kind of stuff had soaked in; don't know whether it was kerosene, gasoline or what—had a peculiar odor. Could not tell what it was because of dust. We turned all this stuff into police department.

The candle was in a square box with lots of holed in top; they went only through one side. The holes in top did not go through bottom. Candle was in hold on top, and box was scorched black. Box was under safe. The safe door was swung back on hinges and turned completely around by concussion. The papers were torn by the concussion, but the steel compartments were in the safe. Asche was with me during the investigation. No finger-prints were taken.

TESTIMONY OF CHARLES ASCHE, FOR PETITIONING CREDITORS.

(Examination by Miss BIRDSALL.)

My name is Charles Asche and I am a finger-print and identification expert, formerly on City [226] Police Department, at present and since November, 1928, have been operating an independent merchant patrol.

I went over to 316 North Sixth Avenue on night of April 21, 1929, at request of Mr. Green, who met me there. I found that the door had been forced and then closed to keep people out. The room was covered with pieces of paper and office supplies, and desks were driven into wall from force of explosion. The safe door had been blown off the hinges, but lay in such a position I know it could not be a safe job. Before disturbing anything, I took these flashlight pictures, one on south side and one on east side of room to show condition of things. I determined that explosion had been alongside safe rather than under it. I knew it was not a safe job because there was no sign of anything on outside. When a safe is blown, the crack is always soaped, and the top of the door is sprung with a chisel or filed; it always shows around the crack. Here, the bolts on wall of safe were out, door completely turned around, and no sign whatever of interior explosion; nothing outside but bits of paper sticking on safe from force of explosion, but not on interior. I took pictures of the interior.

(Testimony of Charles Asche.)

(Pictures introduced in evidence marked Petitioners' Exhibit No. 5 in Evidence.)

(Upon a petition of the petitioning creditors an order was issued by the Court providing for the inclusion of the original pictures in the record, and the original pictures are filed herewith.)

I found on north side of safe a shattered condition on the floor, about twenty inches in diameter, where the floor was all splintered up; also a slow fuse, two pieces of lumber put together and a tallow candle stuck in, the holes for the purpose of creating a draft, and candle was burnt down to the wood where there was a wick or cloth of some kind. I knew then it was a gasoline job. We found a five-gallon can with a hole and spout to pour oil out. It had been exploded. It lay [227] so that the spout was crossways, ends bulged out, one end blown out, showing can was laying down, the position showing it could hold two and one-half gallons. When candle burned to wick it was intended to start fire, but instead it caused explosion. We found no more evidence. Reported to police, verbally and in writing. Last I heard of it. The room was 20x20; there was a display of plumbing fixtures on walls on one side of bathtubs; one-half office, one-half display room; a long counter and partition, with beaver-board partition on other side; office was less than half room. The safe was in southeast portion and the can back in northwest part, either blown or thrown there. A roll-top desk had been against safe. The whole room was littered with all

(Testimony of Charles Asche.)

kinds of books, especially letters and loose-leaf books, all blown to bits the size of end of your little finger. The slow fuse had been blown under safe, but it had been under desk because there was just room enough for fuse and can. The desk was a roll-top, with drawers on either side. That is where can was, and concussion blew it under safe. Fuse was sixteen inches long, boards sixteen inches square. The holes were to give vent—without it candle would go out. All I saved was a piece of desk. It was oak desk and shredded like pieces of raveled cloth. No finger-prints available on account of dust. Glass shattered and wall cracked on one side. Checks and everything about office were destroyed; books and files torn to shreds, with exception of some things behind and protected.

TESTIMONY OF C. L. LANE, FOR INTERVENING CREDITOR (RECALLED.)

Mr. LANE, recalled as witness for intervening creditor out of order by stipulation.

(Examined by Mr. DUFFY.)

I found approfal of loan made May 15th, 1929. Here it is, taken from our financial files, which contains data relating to financial condition of customers or new customers applying for loans or credit. As Assistant Cashier, it is in my custody. The financial files contain data on financial condition of customers [228] of the bank when loans or credit are asked for.

Received as

B.–522.

RESPONDENTS' EXHIBIT "B."

In Evidence.

Face of Exhibit:

Phoenix, Arizona, May 15, 1929.

To THE COMMERCIAL NATIONAL BANK OF PHOENIX, ARIZONA:

I hereby make application for a loan of $2,000.00
We
payable 15 days after date on our name with collat-
my
eral as follows:

PHOENIX PLUMBING & HEATING CO.

Purpose of Proceeds:

Payroll

Back of Exhibit:

Present Loan $————————

Present Contingent $————————

Present Rate:

High Loan: 3–3–27 $7,000.00.

Average Balances:

192— $————————

192— $————————

Total Deposits:

192— $————————

192— $————————

Financial Statement ————————

Quick Assets, $————————

Current Debts, $————————

Stockholder? ————————

Remarks: ————————

Approved: T. G. NORRIS.
I. ROSENZWEIG.
G. M. N. [229]

Thereupon the attorney for the petitioning creditors offered in evidence the schedules in bankruptcy of Leo Francis, which were received in evidence and marked:

B.–522.

PETITIONERS' EXHIBIT No. 6. [230]

In the District Court of the United States, in and for the District of Arizona.

MOMSEN–DUNNEGAN–RYAN COMPANY, a Corporation, et al.,
Petitioning Creditors,
vs.
PHOENIX PLUMBING AND HEATING COMPANY, a Co-partnership, et al.,
(Alleged) Bankrupts.

DEBTOR'S SCHEDULES.

LEO FRANCIS, doing business under the name and style of Phoenix Plumbing and Heating Company, at Phoenix, in the county of Maricopa, state of Arizona, in the Federal District of Arizona, Phoenix Division, respectfully represents:

That he has had his principal place of business at Phoenix, in Maricopa county, Arizona, for the greater portion of ——— years next immediately preceding the filing of the Creditors' Petition praying that he be adjudged a bankrupt;

That he has filed herein his Admission of Willingness to be adjudged a bankrupt;

That he is willing to surrender all his property for the benefit of his creditors except such as is exempt by law, and desires to obtain the benefit of the Acts of Congress relating to Bankruptcy.

That the schedule hereto annexed, marked A (1, 2, 3, 4, 5), and verified by his oath, contains a full and true statement of all his debts, and (so far as it is possible to ascertain), the names and places of residence of his creditors and such further statements concerning said debts as are required by the provisions of said acts.

That the schedule hereto annexed, marked B (1, 2, 3, 4, 5, 6), and verified by his oath, contains an accurate statement of all his property, both real and personal, and such further statements concerning said property as are required by the provisions of said acts.

LEO FRANCIS,
Bankrupt.

O. E. SCHUPP,
Attorney for Bankrupt.

United States of America,
Federal District of Arizona,
County of Maricopa,—ss.

I, Leo Francis, doing business under the name and style of Phoenix Plumbing and Heating Company, one of the debtors mentioned and described in the above-entitled action, do hereby make solemn

oath that the statements contained in the schedules hereto attached are true according to the best of my knowledge, information and belief.

LEO FRANCIS,
Bankrupt.

Subscribed and sworn to before me this 17th day of September, 1929.

[Seal] O. E. SCHUPP.

My commission expires February 15, 1932. [231]

. B.—"Debts" shall include any debt, demand or claim provable in bankruptcy. Sec. 1 [11]

N. B.—"Creditor" shall include anyone who owns a demand or claim provable in bankruptcy and may include his duly authorized agent, attorney or proxy. Sec. 1 [9]

SCHEDULE A.

STATEMENT OF ALL DEBTS OF BANKRUPT.

SCHEDULE A. (1)

tatement of all creditors who are to be paid in full or to whom priority is secured by law.

CLAIMS WHICH HAVE PRIORITY

		AMOUNT
eference to Ledger or Voucher.—Names of Creditors.— Residence (if unknown, that fact to be stated.) Where and when contracted.—Nature and consideration of the debt, and whether contracted as a partner or joint contractor; and if so, with whom.	[1.] Taxes and debts due and owing to the United States.	None.
eference to Ledger or Voucher.—Names of Creditors.— Residence (if unknown, that fact to be stated.) Where and when contracted.—Nature and consideration of the debt, and whether contracted as a partner or joint contractor; and if so, with whom.	[2.] Taxes due and owing to the state of..... or to any county, district or municipality thereof.	
	Maricopa County and State of Arizona by Phoenix Plumbing & Heating Co.....	217 63
	City of Phoenix, Arizona, by Phoenix Plumbing & Heating Co., $99.92, by Leo Francis, $5.36, Total.....	105 28

Reference to Ledger or Voucher.—Names of Creditors.—Residence (if unknown, that fact to be stated.) Where and when contracted.—Nature and consideration of the debt, and whether contracted as a partner or joint contractor; and if so, with whom.

[3.] Wages due workmen, clerks or servants to an amount not exceeding $300.00 each, earned within three months before filing this petition.

Earl Shipp, 6 days @ $4.00 per day.....	24 00
Lyon Francis, 6 days @ $10.00 per day.....	60 00
B. H. Purcell, Yuma, Arizona, 8½ da. @ $10.00 per day.....	85 00

Reference to Ledger or Voucher.—Names of Creditors.—Residence (if unknown, that fact to be stated.) Where and when contracted.—Nature and consideration of the debt, and whether contracted as a partner or joint contractor; and if so, with whom.

[4.] Other debts having priority by law.

None

Total.....491 91

LEO FRANCIS, Petitioner. [232]

(Full sets of schedule blanks must be filed. If there are no items applicable to any particular blanks, such fact should be stated in said blank. Each schedule sheet must be signed.)—Rule 14.

SCHEDULE A. (2)

CREDITORS HOLDING SECURITIES.

(N. B.—Particulars of securities held, with dates of same, and when they were given, to be stated under the names of the several creditors, and also particulars concerning each debt, as required by the Acts of Congress relating to Bankruptcy, and whether contracted as partner or joint contractor with any other person, and if so, with whom.)

Reference to Ledger or Voucher—Names of creditors.—Residence (if unknown, that fact must be stated).—Description of securities.—When and where debts were contracted. Value of securities.		AMOUNT OF DEBTS
	Standard Sanitary Manufacturing Company, Phoenix, Arizona, estimated at..	39,552 62
	Partially secured by following assignments:	
	Balance on contract with W. H. Brown for work on Hospital for the Insane; amount of contract $7,270.05, credits $4,080.00, balance assigned May 7, 1929 ..... 3,190.05	
	Contract with the City of Phoenix, Phoenix, Arizona, for construction of new City Hall; amount of contract $23,-233.85 with extras, credited $14,526.00, balance assigned May 7, 1929...8,707.85	
	This job was taken over Southern Surety Company, bondsman, for completion.	
	Contract with Phoenix Union High School for Central Heating Plant; amount of contract and extras $29,326.10, credited $25,819.00, balance assigned May 7, 1929 ..... 3,507.10	
	This job was taken over by the Massachusetts Bonding Company for completion.	

Contract with Phoenix Union High School for Junior College Building; amount of contract and extras $8,424.00, credited $6,318.00; balance assigned May 7, 1929 .....2,106.00

Job Uncompleted

Contract with Phoenix Union High School for Library and Class Room building; amount of contract and extras $18,860.00, credited $9,450.00; balance assigned May 7, 1929 .....9,410.12

This job was taken over by American Bonding Company for completion.

Unable to give actual or approximate amounts received or that may be received by the Standard Sanitary Mfg. Co., on above assignments.

The Crane Company, Phoenix, Arizona. The Crane Estimated at 5,551 33

Partially secured by the following assignments:

Contract with O. R. Bell, Contractor, job at 23 W. Monroe St., Phoenix, $289.91 ..... 289.91

Contract with O. R. Bell, job at 917 N. 8th St., Phoenix 400.00

Amount due from E. J. Bennitt, Country Club Drive, Phoenix, Arizona...1,000.00

Amount due from Harry Tritle No. Alvarado St., Phoenix, Ariz.....800.00

Forward Total 45,103 95

LEO FRANCIS, Petitioner. [233]

(Full sets of schedule blanks must be filed. If there are no items applicable to any particular blanks, such fact should be stated in said blank. Each schedule sheet must be signed.)—Rule 14.

Forward..... 45,103.95

Schedule A–2, page 2. Crane Co. Cont.

Amount due on contract with Green & Hall on Dan Campbell residence; amount of contract and extras $1597.55, credited $900.00, balance due $697.55, $500.00 of which assigned to Crane Co..... 500.00

Amount due from James Barnes, W. Latham St..... 271.49

Contract with Green & Hall of Schwenker residence, $2934.00, credited, $1300.00, balance assigned $1,634.00. This job taken over by Massachusetts Bonding Co., for completion .....

Contract with Hogan & Farmer on Marana Teachers College, Marana, Arizona, Contract $1127.00 credited $500.00, balance $627.00, assigned..... 627.00

Unable to give actual or approximate amounts received or that may be received by the Crane Company on above assignments.

Total..... 48,136.44

LEO FRANCIS. [234]

SUGGESTION

(In filing this blank, be careful to strictly follow form which requires a statement as to "nature and consideration of debt; and whether any judgment," etc.)

SCHEDULE A. (3)

CREDITORS WHOSE CLAIMS ARE UNSECURED.

(N. B.—When the name and residence (or either) of any drawer maker, indorser, or holder of any bill or note, etc., are unknown the fact must be stated, and also the name and residence of the last holder known to the debtor. The debt to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property.)

Reference to Ledger or Voucher.—Names of creditors.—Residence (if unknown, that fact must be stated).—When and where contracted.—Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, etc., and whether contracted as partner or joint contractor with any other person; and if so, with whom.		AMOUNT
	Arizona Grocery Company, Phoenix, Arizona	2 25
	Arizona Printers, Inc., Phoenix, Arizona	28 25
	Arizona Concrete Co., Phoenix, Arizona	181 87
	Arizona Republican, Phoenix, Arizona	64 00
	Atlas Valve Co., 282 South St., Newark, N. J.	337 56
	Arizona Hardware Supply Co., Phoenix, Arizona	8 92
	Armstrong Machine Works, Three Rivers, Mich.	79 92
	Allison Steel Mfg. Co., Phoenix, Arizona	317 42
	Arizona Battery & Equipment Co., Phoenix, Arizona	322 73
	Arizona Storage & Distributing Co., Phoenix, Arizona	15 00

A. & A. Motor Co., 301 N. Central Ave., Phoenix, Ariz.	24 63
Arizona Directory Co., 1240 S. Main St., Los Angeles, Calif.	10 00
Arizona Plumbing & Supply Co., Phoenix, Arizona	29 65
Aetna Life Insurance Company, Hartford, Conn.	12 94
Arizona Highway Department, Phoenix, Arizona	4 80
Bobrick Chemical Corp., 111–117 Gary St., Los Angeles, Cala.	26 56
A. C. Brauer Company, St. Louis, Mo.	5 55
The Builder & Contractor	24 00
Boston Store, Phoenix, Arizona	20 82
Capitol Foundry Co., Phoenix, Arizona	8 20
Central Arizona Light and Power Co.	6 55
Commercial National Bank, Phoenix, Arizona	6,100 00
Credit Audit Co., 1931 Ry. Exchange Bldg., St. Louis, Mo.	5 55
Vernon Clark, Phoenix, Arizona	2 55
Edwards, Wildey & Dixon Co., Phoenix, Arizona	7 25
Five Points Blacksmith Shop, Phoenix, Ariz.	35 55
The Elliott Engineering Company, About.	2,680 00
Joe Francis, balance a/c money loaned, Phoenix, Arizona	60 00
Don Gilmore, Inc., Phoenix, Arizona	5 80
The Gazette Co., Inc., Phoenix, Ariz.	15 00
Gila Valley Plumbing & Heating Co., Safford, Ariz.	11 99

Glauber Bros. Mfg. Co., Cleveland, Ohio..	69 6
Hulse & Dick, Ford Dealers, Yuma, Arizona	6 0
J. D. Halstead Lumber Co., Phoenix, Arizona	116 2
E. R. Hill, Phoenix, Ariz.....	30 0
Heinz, Bowen & Harrington, Phoenix, Arizona	29 2
A. J. Keen, 316 N. 6th Ave., Phoenix, Arizona	30 0
Los Angeles Mfg. Co., Los Angeles, Calif..	596 8
Total	

(Full sets of schedule blanks must be filed. If there are no items applicable to any particular blanks, such fact should be stated in said blank. Each schedule sheet must be signed.)—Rule 14.

Petitioner. [235]

Page 3 Continued.

Mathews Paint Co., Phoenix, Arizona.....	73 10
O. B. Marston, Phoenix, Arizona.....	2 20
Milwaukee Valve Co., Milwaukee, Wisconsin	301 00
Momsen, Dunnegan & Ryan, Phoenix, Arizona	486 08
McArthur Bros., Phoenix, Arizona.....	32 30
J. H. McCarthy, Phoenix, Arizona.....	1.00
Merchants Police Patrol, Phoenix, Arizona.	2 00
M. & M. Welding Co., Phoenix, Arizona....	88 60
Mt. States Tel. & Tel. Co., Phoenix, Arizona	22 70
New Hale Electric Co., Phoenix, Arizona..	4 23
Fred Noll Tire Service, Phoenix, Arizona..	44 50
Total.....	12,297 91

LEO FRANCIS,
Petitioner. [236]

O. E. Specialty Mfg. Co., Phoenix, Arizona.	166 24
Oil Burning Equipment Co., Phoenix, Arizona 3,225	00
Powers Regulator Co., 2720 Greenview Ave., Chicago, Ill.....	131 25
Phoenix Arizona Club, Phoenix, Arizona..	15 00
Phoenix Auto Supply Co.., Phoenix, Arizona	50 91
The Peoples Transfer Co., Phoenix, Arizona	19 56
Pratt Gilbert Hardware Co., Phoenix, Arizona	73 31
Postal Telegraph Co., Phoenix, Arizona...	19 80
Public Service Brass Company.....	448 50
The Phoenician, Phoenix, Arizona.....	10 00

The Phoenix Roofing & Supply Co., Phoenix, Arizona	92 50
Pacific Construction Co., Phoenix, Arizona.	17 00
W. M. Pepper, Phoenix, Arizona	531 95
Phoenix Tempe Stone Co., Phoenix, Arizona	34 00
Phoenix Blue Print Co., Phoenix, Arizona.	75
Pace Hardware Co., Safford, Arizona	35 10
Pure Food Cafe, Miami, Arizona	27 25
P. & M. Mfg. Co., 622 E. 4th St., Los Angeles, Calif.	9 48
Rio Grande Oil Company, Phoenix, Arizona	295 71
Chas. H. Richeson, Atty., Phoenix, Arizona.	10 00
Southwestern Cement & Plaster Products Co.	18 00
Standard Insurance Agency, Phoenix, Arizona	272 67
Star Sheet Metal Works, Phoenix, Arizona	118 64
S. W. Sash & Door Co., Phoenix, Arizona.	23 45
Southwestern Mfg. & Supply Co., Phoenix, Arizona	2,108 00
Sun Drug Co., Phoenix, Arizona	1 00
O. S. Stapley Co., Phoenix, Arizona	1 95
E. F. Sanguinetti, Yuma, Arizona	10 67
Silas Plumbing Co., Yuma, Arizona	125 00
N. R. Thomsen	313 66
Talbot & Hubbard, Phoenix, Arizona	50
Letis R. Templin, Phoenix, Arizona	5 00
The Desert Express, Yuma, Arizona	150 00
Union Oil Company, Phoenix, Arizona	384 55

Western Union Telegraph Co., Phoenix, Arizona	5 58
Welker & Son Transfer Co., Safford, Arizona	165 01
Yuma Central Auto Co., Yuma, Arizona	6 60
Western Builders, Phoenix, Arizona	639 49
M. L. Vieux, Phoenix, Arizona	55 00
The Gazetteer Pub. & Printing Co., Denver, Colo	15 00
Plaza Stone Cottages, Miami, Arizona	12 25
Total	9,643 24

LEO FRANCIS,
Petitioner. [237]

SCHEDULE A. (4)

LIABILITIES ON NOTES OR BILLS DISCOUNTED WHICH OUGHT TO BE PAID BY THE DRAWERS, MAKERS, ACCEPTORS OR INDORSERS.

(N. B.—The dates of the notes or bills, and when due, with the names, residences and the business or occupation of the drawers, makers, acceptors or indorsers thereof, are to be set forth under the names of the holders. If the names of the holders are not known, the name of the last holder known to the debtor shall be stated, and his business and place of residence. The same particulars as to notes or bills on which the debtor is liable as indorser.)

Reference to Ledger or Voucher.—Names of holders so far as known.—Residence (if unknown, that fact must be stated). —Place where contracted.—Nature of liability, and whether same was contracted as partner or joint contractor or with any other person; and if so, with whom.	AMOUNT
None.	
TOTAL	

(Full sets of schedule blanks must be filed. If there are no items applicable to any particular blanks, such fact should be stated in said blank. Each schedule sheet must be signed.)—Rule 14.

LEO FRANCIS, Petitioner. [238]

SCHEDULE A. (5)

ACCOMMODATION PAPER.

(N. B.—The dates of the notes or bills, and when due, with the nes and residences of the drawers, makers, acceptors, and indorsers reof, are to be set forth under the names of the holders; if the nkrupt be liable as a drawer, maker, acceptor, or indorser thereof, is to be stated accordingly. If the names of the holders are not own, the name of the last holder known to the debtor should be ted, with his residence. State particulars as to other commercial per.)

erence to Ledg- or Voucher.— ames of hold- s. — Residence f unknown, at fact must stated).— ames and resi- nces of per- ns accommo- ted. — Place ere contract- .—Whether bility was ntracted as rtner or joint ntractor, or th any other rson; and if , with whom.	AMOUNT
	None.
	TOTAL.....

LEO FRANCIS, Petitioner. [239]

Full sets of schedule blanks must be . If there are no items applicable ny particular blanks, such fact should stated in said blank. Each schedule t must be signed.)—Rule 14.

SCHEDULE A. (4)

LIABILITIES ON NOTES OR BILLS DISCOUNTED WHICH OUGHT TO BE PAID BY THE DRAWERS, MAKERS, ACCEPTORS OR INDORSERS.

(N. B.—The dates of the notes or bills, and when due, with the names, residences and the business or occupation of the drawers, makers, acceptors or indorsers thereof, are to be set forth under the names of the holders. If the names of the holders are not known, the name of the last holder known to the debtor shall be stated, and his business and place of residence. The same particulars as to notes or bills on which the debtor is liable as indorser.)

Reference to Ledger or Voucher.—Names of holders so far as known.—Residence (if unknown, that fact must be stated).—Place where contracted.—Nature of liability, and whether same was contracted as partner or joint contractor or with any other person; and if so, with whom.	AMOUNT
	None.
TOTAL	

(Full sets of schedule blanks must be filed. If there are no items applicable to any particular blanks, such fact should be stated in said blank. Each schedule sheet must be signed.)—Rule 14.

LEO FRANCIS, Petitioner. [238]

SCHEDULE A. (5)

ACCOMMODATION PAPER.

(N. B.—The dates of the notes or bills, and when due, with the names and residences of the drawers, makers, acceptors, and indorsers thereof, are to be set forth under the names of the holders; if the bankrupt be liable as a drawer, maker, acceptor, or indorser thereof, it is to be stated accordingly. If the names of the holders are not known, the name of the last holder known to the debtor should be stated, with his residence. State particulars as to other commercial paper.)

Reference to Ledger or Voucher.—Names of holders.—Residence (if unknown, that fact must be stated).—Names and residences of persons accommodated.—Place where contracted.—Whether liability was contracted as partner or joint contractor, or with any other person; and if so, with whom.	AMOUNT
None.	
TOTAL.....	

LEO FRANCIS, Petitioner. [239]

(Full sets of schedule blanks must be filed. If there are no items applicable to any particular blanks, such fact should be stated in said blank. Each schedule sheet must be signed.)—Rule 14.

OATH TO SCHEDULE A.

United States of America,
Federal District of Arizona,—ss.

In the Matter of Momsen-Dunnegan-Ryan Co. et al., Petitioners, vs. Phoenix Plumbing and Heating Company, Leo Francis, Doing Business Under the Name and Style of Phoenix Plumbing & Heating Company, et al., Alleged Bankrupts in Bankruptcy No. B.–522—Phoenix.

On this —— day of September, A. D. 1929, before me personally came Leo Francis, the person mentioned in and who subscribed to the foregoing Schedule, and who being by me first duly sworn, did declare the said Schedule to be a statement of all his debts, in accordance with the Acts of Congress relating to Bankruptcy.

LEO FRANCIS.

Subscribed and sworn to before me this 17th day of September, 1929.

[Seal] O. E. SCHUPP,
Notary Public.

My commission expires February 13, 1932.

(This Oath to Follow Schedule A–5.) [240]

SCHEDULE B. (2)
PERSONAL PROPERTY

		Dollars	Cents
A. Cash on hand.		None	
B. Bills of exchange, promissory notes, or securities of any description (each to be set out separately).		None	
C. Stock in trade in ..... business of ..... at ..... of the value of	Plumbing & Heating, 316 N. 6th Ave., Phoenix, Ariz., about $3,000.00: Consists of plumbing supplies of all kinds, pipe, lead, brass fixtures, connections, etc.	3,000	00
D. Household goods and furniture, household stores, wearing apparel and ornaments of the person, viz:	Plumbing supplies at Yuma, purchased for Yuma High School Job but not used in construction of building, about	500	00
	Wearing apparel and ornaments	50	00
E. Books, prints, and pictures, viz:	Cash-book, account receivable book, Contract-book and time-book, no particular value.		
F. Horses, cows, sheep and other animals (with number of each), viz:	None.		
G. Carriages and other vehicles, viz:	1 Star Truck, $50.00; 1 Chevrolet truck, $200.00, (claimed exempt), and 1 Ford Truck, $150.00	400	00

H. Farming stock and implements of husbandry, viz: None.

I. Shipping and shares in vessels, viz: None.

K. Machinery, fixtures, apparatus and tools used in business, with the place where each is situated, viz: 1–Toledo power drive thread cutting machine $100.00; 1–Bench vice $25.00; 1–36″ Stilson wrench $2.50; 1–36″ Chain tong $2.50; 1 pipe cutter from 2½ to 4″ $4.00; 1 claw-hammer $0.35¢; 1–ball peon-hammer $0.50; 1–single jack-hammer $0.75; 1 monkey-wrench $0.50; 4–rock points $1.00; 2–cold chisels $0.70¢; 1–14″ Stilson $1.00; 1–10″ Stilson $0.75¢; 2–18″ Stilsons $2.50; 2–24″ Stilsons $3.00; 1–trimo pipe cutter from ¼ to 2″ $2.50; 1–#1A Toledo stocks from 1 to 2″ $8.00; 1–#0 Toledo stocks from ⅜ to 1″ $5.00; 1–Toledo stocks from 2½ to 4″, $15.00; 1–pipe reamer $0.00; 1–brace & bit $0.75, 1–rod spud wrench $1.00. Total..... 177 30

L. Patent, copyrights and trademarks, viz:

M. Goods or personal property of any other description, with the place where each is situated, viz:

All claimed as exempt. L. none. M. none.

Total..... 4,127 30

LEO FRANCIS, Petitioner. [241]

(Full sets of schedule blanks must be filed. If there are no items applicable to any particular blanks, such fact should be stated in said blank. Each schedule sheet must be signed.)—Rule 14.

SCHEDULE B.

STATEMENT OF ALL PROPERTY OF BANKRUPT.

SCHEDULE B. (1)

REAL ESTATE.

Location and description of all real estate owned by debtor, or held by him. Incumbrances thereon, if any, and dates thereof. Statement of particulars relating thereto.	ESTIMATED VALUE
None.	
TOTAL.....	

(Full sets of schedule blanks must be filed. If there are no items applicable to any particular blanks, such fact should be stated in said blank. Each schedule sheet must be signed.)—Rule 14.

LEO FRANCIS, Petitioner. [242]

9

SCHEDULE B (3)

CHOSES IN ACTION.

		Dollars	Cents
A. Debts due petitioner on open account.	See separate sheets following.....	$3,724	24
B. Stock in incorporated companies, interest in joint stock companies, and negotiable bonds.	None.		
C. Policies of Insurance.	Aetna Life Insurance Company, Hartford, Connecticut	00	00
D. Unliquidated claims of every nature, with their estimated value.	See separate sheets following.....	35,657	79
E. Deposits of money in banking institutions and elsewhere.	None.		
	TOTAL.....	39,383	03

(Full sets of schedule blanks must be filed. If there are no items applicable to any particular blanks, such fact should be stated in said blank. Each schedule sheet must be signed.)—Rule 14.

LEO FRANCIS, Petitioner. [243]

Schedule B–3–A.

ACCOUNTS RECEIVABLE.

A. Z. Root Beer Co., Phoenix, Arizona	1.50
Arizona Landscape Gardners, Phoenix, Arizona	36.75
Mr. Atwater, c/o Phoenix Linen Supply Co., Phoenix, Arizona	19.90
Mrs. Anderson, 1760 E. Princeton St., Phoenix, Arizona	5.30
Mrs. Archer, 101 E. Coronado St., Phoenix, Ariz.	18.00
Mrs. Abraham, 900 E. Moreland, Phoenix, Arizona	1.00
Arizona Sales Co., 306 N. Center St., Phoenix, Ariz.	31.00
Mrs. Antrim, 905 W. Palm Lane, Phoenix, Arizona	1.35
Arizona Garment Mfg. Co., Phoenix, Arizona	35.75
Beers & Clever, Phoenix, Arizona	27.05
L. M. Byrd, 1325 W. Monroe St., Phoenix, Arizona	22.15
Fred Barrows, 1721 W. Jefferson St., Phoenix, Arizona	3.50
W. E. Brooks, 12 S. 18th Avenue, Phoenix, Arizona	4.95
B. A. Banks, 1226 E. Garfield St., Phoenix, Arizona	1.75
Booker T. Washington Hospital, 1342 E. Jefferson St., Phoenix	2.40
A. C. Baker, 1422 N. Central Ave., Phoenix.	14.60
Bob Baker, 929 E. Coronada St., Phoenix, Arizona	5.15

Bob Brazee, 1043 E. Highland Ave., Phoenix, Arizona 9.35
Dr. Brown, 1106 W. Washington St., Phoenix, Ariz. 120.63
Mr. Balke, Balke Bldg., Phoenix, Arizona . 4.50
O. R. Bell, Phoenix, Arizona 2.00
Central Arizona Light & Power Co., Phoenix, Arizona 4.00
Ethel Clark, 1218 W. Monroe St. 15.35
Mr. Cousins, 751 E. Van Buren St., Phoenix, Ariz. 12.00
Mr. Coulson, 1125 N. 2nd St., Phoenix, Arizona 1.75
J. J. Cox, 2230 N. 7th St., Phoenix, Arizona. 2.60
Mrs. E. S. Caldren, 1125 N. 2nd St., Phoenix, Arizona 1.50
C. C. Cragin, 517 W. McDowell Road, Phoenix, Arizona 3.20
Mrs. Carnes, 328 N. 4th Ave., Phoenix, Arizona 30.00
Otto Christopher, 1006 S. 3rd Ave., Phoenix, Arizona 2.65
Crane Co., Phoenix, Arizona 5.00
Jas. Coster, 375 N. 6th Avenue, Phoenix, Arizona 2.20
F. M. Corwin, 841 N. 7th Avenue, Phoenix, Arizona 2.25
Maricopa Tuberculosis Hospital, Phoenix, Arizona 4.95
Mc. Connell, 64 W. Holly St., Phoenix, Arizona 2.65
W. G. Dodson, 623 W. Adams St., Phoenix, Arizona 14.65

R. E. Davey, 702 E. Jefferson St., Phoenix, Arizona 3.75
Dean's Grocery, 703 N. 2nd St., Phoenix, Arizona 10.90
Mr. Dorris, Indian School Road & 9th Ave., Phoenix, Ariz. 4.00
Mrs. Dougherty, 900 N. 7th St., Phoenix, Arizona 3.00
Mrs. Mary Dunlap, 330 W. Latham St., Phoenix, Ariz. 2.55
H. S. Dorman, c/o Lincoln Mortgage Co., Phoenix, Arizona 4.85
W. W. Dunn, 1141 W. Lincoln St., Phoenix, Arizona 1.75
Mrs. Betty Dameron, 804 N. 5th Ave., Phoenix, Arizona 11.75
Dixie Hotel, 4th Avenue & Washington St., Phoenix, Arizona 3.05
C. B. Evans, 1215 Woodlawn Avenue, Phoenix, Ariz. 3.50
W. A. Evans, 3320 N. Central Avenue, Phoenix, Arizona 21.89
Mrs. T. L. Edens, 520 No. 9th Ave., Phoenix, Arizona 1.50
Mrs. Ellios, 340 W. Latham St., Phoenix, Arizona 9.20
Harold Foote, 2028 W. Monroe St., Phoenix, Arizona 1.50
Mrs. V. C. Ferguson, 4029 N. Vernon St., Phoenix, Arizona 5.00
J. Fundenburg, 318 N. 6th Avenue, Phoenix, Arizona 2.60
Five Points Barber Shop, Phoenix, Arizona 2.50

E. L. Freeland, 100 W. Roosevelt St., Phoenix, Arizona 5.15
First Baptist Church, 3rd Ave., & Monroe Sts., Phoenix 3.45
Mrs. J. Friedman, 1126 E. Willetta St., Phoenix, Ariz 1.50
First Methodist Church, 2nd Ave. & Monroe Sts., Phoenix 4.30
Mr. Foster, c/o Barber Shop 1.95
Mrs. D. Francis, 88 Mitchell Drive, Phoenix, Ariz. 2.50
[244]

Schedule B.–3–A.

Accounts Receivable—Continued.

Mr. Gold, 225 E. Washington St., Phoenix, Arizona 1.50
Mrs. Galbraith, 1410 N. 2nd St., Phoenix, Arizona 6.15
B. M. Guffith, 1595 E. McDowell, Phoenix, Arizona 5.90
Mr. Goyer, 337 N. 6th Ave., Phoenix, Arizona 6.75
Nick Gannis, 415 Oakland Street, Phoenix, Arizona 4.50
Fred Gardner, 916 S. 7th Ave., Phoenix, Arizona 5.83
Walter Godman, Phoenix, Arizona 29.16
H. U. Gold, 1114 N. 2nd St., Phoenix, Arizona 12.00
H. Grimshaw, 390 N. 4th Avenue, Phoenix . 2.25
Mr. Giveno, 634 N. 2nd Avenue, Phoenix, Arizona 3.40

Mrs. A. E. Holmer, 2005 W. Adams St., Phoenix, Ariz. 19.75
Mr. Henderson, 801 N. 10th Avenue, Phoenix, Ariz 3.00
Marshall Humphrey, 1021 E. Willetta St., Phoenix, Arizona 9.05
Miss Paul, c/o Lincoln Mortgage Co., Phoenix, Arizona 3.85
Samuel Haldeman, 15 W. Washington St., Phoenix, Ariz. 6.35
Hollywood Service Station, 902 W. Van Buren St., Phoenix 27.48
F. J. Halterman, 1202 W. Adams, Phoenix, Arizona 2.00
Mr. Hunt, 417–15 Oakland St., Phoenix, Ariz. 2.85
L. G. Harvey, 1122 W. Latham St., Phoenix, Arizona 7.27
Hi-Way Coffee Shop, Phoenix, Arizona ... 4.10
Mrs. Harvey, 108 N. 21st Ave., Phoenix, Arizona 1.25
Mr. Hoagland, 127 E. Palm Lane, Phoenix, Arizona 7.51
Mrs. J. B. Harrison, 704 N. Central Ave., Phoeniz, Ariz. 2.75
Mrs. Humphreys, 822 N. 6th Ave., Phoenix, Arizona 16.55
Mr. Hyder, 511 N. 5th St., Phoenix, Arizona 4.15
Henderson Bros., N. 7th Ave., Phoenix, Arizona 1.75
Ingleside Inn, Phoenix, Arizona 59.65
G. W. Johns, 217 N. 16th Avenue, Phoenix, Arizona 3.20

Dalton Johnson, 2134 W. Jefferson St., Phoenix, Ariz. 2.60
Geo. A. Johnson, Toggery Shop, Mesa, Arizona 9.45
H. A. Jones, Five Points, Phoenix, Arizona. 4.42
Mr. Johnson, 1010 W. Madison St., Phoenix, Ariz. 2.15
Jesse Hat Shop, Phoenix, Arizona 6.58
Mr. Johnson, 1107 Grand Avenue, Phoenix, Arizona 1.10
R. C. Ketchum, 401 N. 7th Avenue, Phoenix, Arizona 37.90
Mrs. Helen Kinsella, 610 N. 4th Avenue, Phoenix, Ariz. 5.70
B. Kilepher, 806 N. 3rd Avenue, Phoenix, Arizona, ... 2.60
P. M. Kerrick, 81 W. Willetta St., Phoenix, Ariz. 2.55
Mrs. Kolling, 374 Verde Lane, Phoenix, Arizona 3.50
Mrs. Harry Konophy, Phoenix, Arizona ... 1.50
Lorraine Beauty Shop, 210 O'Neil Bldg., Phoenix, Ariz. 14.10
D. A. Little, 2109 W. Filmore St., Phoenix, Arizona 2.65
G. H. Lutgerding E. Country Drive, Phoenix, Arizona 21.90
Lebanon Hotel, 333 N. 2nd Avenue, Phoenix, Arizona 98.95
Mrs. Thomas Lewis, 712 S. 7th St., Phoenix, Arizona 50.68
Mrs. Lane, 42 W. Culver St., Phoenix, Arizona 3.85

Mrs. Lindquist, 608 W. Van Buren St., Phoenix, Arizona 2.80
L. L. Lindsey, 1310 W. Moreland St., Phoenix, Arizona 1.89
Mrs. T. R. Lewis, 421 Southern Avenue, Phoenix, Arizona 21.72
Lincoln Mortgage Co., 1513 W. Taylor St., Phoenix, Ariz. 4.10
Mrs. R. Littlefield, 622 N. 6th Ave., Phoenix, Arizona 1.50
Mrs. Luke, 715 E. Washington St., Phoenix, Ariz. 2.65
Maricopa County, Phoenix, Arizona 128.90
Mrs. Mitchell, 507 E. Moreland St., Phoenix, Ariz. 3.50
H. L. Medinger, 158 W. Merrill St., Phoenix, Arizona 9.10
Mrs. J. H. More, 524 W. Portland St., Phoenix, Ariz. 8.20

[245]

Schedule 3–B.–A.

Accounts Receivable—Continued.

Mr. Moss, 46 W. Lewis St., Phoenix, Arizona 1.45
Mr. E. W. Montgomery, 537 E. Moreland St., Phoenix, Ariz. 6.95
Moeller Apartments, 2nd Ave. & Filmore St., Phoenix 11.75
Modern Auto Court, 1930 W. Van Buren St., Phoenix, Ariz. 5.25
Mrs. Mathias, 816 N. 2nd St., Phoenix, Ariz. 4.75
Lee Moffitt, Phoenix, Arizona 31.28

L. W. McHattan, 1114 W. Lynwood St., Phoenix, Ariz. 8.80
Mc McCray, 2615 N. 16th St., Phoenix, Ariz. 1.75
C. F. McConnell, Casa Grande, Arizona 158.11
Norman Landscape Gardeners, 1509 N. Central Ave., Phoenix 38.46
North Central Coffee Shop, 506 N. Central Ave., Phoenix. 55.40
Mrs. Nile, 1111 W. Adams St., Phoenix, Arizona 29.50
W. H. Nelson, Phoenix, Ariz. 5.40
Newcomers Realty Co., Phoenix, Arizona .. 1.60
Mr. Nickerson, 840 N. 1st Avenue, Phoenix, Ariz 1.75
A. D. Nace, 1540 W. Washington St., Phoenix, Arizona 28.59
J. E. Nelson, 1705 W. Jefferson St., Phoenix, Arizona 6.15
Mrs. H. L. Nace, 1546 W. Washington St., Phoenix, Ariz. 3.10
W. D. Northern, Phoenix, Arizona 7.50
New York Bakery, 248 E. Washington St., Phoenix, Ariz. 73.20
J. G. O'Malley, 1202 N. 2nd St., Phoenix, Arizona 2.05
Phoenix Union High School District, Phoenix, Ariz. 1.75
E. E. Pascoe, 14 E. Adams St., Phoenix, Arizona 3.35
Wm. Pepper, 1st St. & McKinley, Phoenix, Ariz. 115.00

F. L. Perry, 722 N. 7th St., Phoenix, Arizona 1.35

R. H. Parsons, 1422 N. 2nd St., Phoenix, Ariz. 12.20

Mrs. Palmer, 315 E. Thomas Road, Phoenix, Ariz. 2.00

Phoenix Tent & Awning Co., 226 W. Adams St., Phoenix, Ariz. ..... .56

Phoenix Hotel, 1st & Jefferson Sts., Phoenix, Ariz. 2.00

J. B. Petty, 1345 Grand Avenue, Phoenix, Arizona 4.45

Phoenix Lunch Room, 231 E. Washington St., Phoenix, Ariz. 8.90

Pay'n Takit Garage, 5th Ave. & Washington Sts., Phoenix 18.75

Mr. Rubenstein, 2028 Richland Ave., Phoenix, Ariz. 29.25

Ranch House Land Co., 16 W. Roosevelt St., Phoenix, Ariz. 4.35

L. H. Rhuart, 720 E. McDowell, Phoenix, Arizona 12.20

R. G. Reid, 2529 Dayton St., Phoenix, Arizona 3.30

Jas. Rymer, c/o Packard Motor Co., Phoenix, Ariz. 28.95

Mr. Randell, 1310 W. Willetta St., Phoenix, Ariz. 5.85

Mrs. S. B. Richards, 810 N. 1st Ave., Phoenix, Ariz 5.20

D. Rubenstein c/o Western Builders, Phoenix, Ariz. 14.22
State of Arizona, Phoenix, Arizona 91.63
Mrs. Lee, 140 N. Central Ave., Phoenix, Ariz. 9.95
Standard Sanitary Mfg. Co., Phoenix, Arizona 517.85
Mr. Shackelford, 231 W. Jefferson St., Phoenix, Ariz. 1.50
Mr. Stellar, 925 N. 9th Ave., Phoenix, Ariz. 1.45
Mr. Stillett, 825 N. 9th Ave., Phoenix, Arizona 1.75
H. L. Stine, 1819 W. Jefferson St., Phoenix, Ariz. 101.20
R. F. Soule, 1336 E. Moreland, Phoenix, Ariz. 1.25
Stearnman Construction Co., Phoenix, Arizona 72.45
Mrs. Shaw, 72 Mitchell Drive, Phoenix, Arizona 4.50
Dr. Stoner, 429 Ellis Bldg., Phoenix, Arizona 4.40
S. A. Sprague, 834 E. Palm Lane, Phoenix, Arizona 1.00
Ralph Summers, 1217 E. Culver St., Phoenix, Arizona 7.10
T. J. Smith, 1221 E. Monroe St., Phoenix, Arizona 18.20

[246]

Schedule 3–B.–A.

Accounts Receivable—Continued.

Southwestern Mfg. Co., Phoenix, Arizona..	135.05
Mrs. Stevens, 1204 W. Washington St., Phoenix, Ariz.	1.35
Mr. Stone, 743 E. Portland St., Phoenix, Ariz.	2.80
Star Sheet Metal Works, Phoenix, Arizona	2.40
Mr. Treadwell, 1027 N. 11th St., Phoenix, Arizona	4.50
Mr. Towne, 4024 N. Vernon, Phoenix, Arizona	6.55
H. R. Tritle, 611 N. Central Ave., Phoenix, Ariz.	1.25
E. W. Thayer, Phoenix, Arizona	171.47
Mr. Towles, 756 E. Moreland St., Phoenix, Arizona	3.10
J. Thornton, 333 W. Latham St., Phoenix, Ariz.	6.10
Mrs. H. B. Tracy, Phoenix, Arizona	4.05
Mr. Turley, Tempe, Arizona	21.00
W. A. Thompson Electrical Co., 123 W. Adams St., Phoenix, Ariz.	1.18
Mr. Taylor, 2021 Alvarado St., Phoenix, Arizona	15.50
W. H. Tate, 720 N. 7th Ave.	1.25
J. C. Tudy, Woodlea St., Phoenix, Arizona.	11.95
Mr. Tootle, 955 W. Moreland St., Phoenix, Ariz.	30.80
Mr. Urban, 636 N. 3rd Ave., Phoenix, Ariz.	2.90
G. W. Vickers, 840 N. 1st Ave., Phoenix, Ariz.	5.75

E. O. Van Rheim, 313 N. 20th Ave., Phoenix, Ariz. 4.50
Mr. Woodbridge, R. F. D. #7, Box 1180, Phoenix, Arizona 9.20
Mr. Warren, 825 E. Sheridan St., Phoenix, Ariz. 2.00
J. M. Wilson, 404 N. 7th Ave., Phoenix, Ariz. 11.75
Mr. Williams, 1218 N. 3rd St., Phoenix, Ariz. 3.50
M. E. Waddoups, 2020 N. Central Avenue, Phoenix, Ariz. 7.90
J. W. Walker, Ellis Bldg., Phoenix, Arizona 58.10
Winser Mule Market, Phoenix, Arizona.... 3.70
Mrs. Grace Wright, 1722 W. Jackson St., Phoenix, Ariz. 6.11
Elmer Warren, 1508 W. Filmore St., Phoenix, Ariz. 15.00
W. A. Walker, 2107 W. Adams St., Phoenix, Arizona 7.95
W. A. Washburn, 324 N. 9th Avenue, Phoenix, Arizona 6.55
Mr. Winship, 715 N. 12th Ave., Phoenix, Ariz. ..... .75
Mr. Warren, 612 N. 5th Ave., Phoenix, Arizona 1.00
E. B. Walluk, 85 W. Willetta St., Phoenix, Arizona 7.20
Mrs. Hannah White, 1715 W. Van Buren St., Phoenix, Ariz. 1.50
Mr. T. B. Williams, 817 N. 4th Ave., Phoenix, Ariz. 12.95

Mrs. Weener, 817 W. McKinley St., Phoenix, Arizona 4.50
Mr. Weatherbee, 2126 W. Jefferson St., Phoenix, Ariz. 9.90
J. L. Walker, 649 N. 4th Ave., Phoenix, Arizona 36.54
Tom Weatherford, Contractor, Phoenix, Arizona 72.74
A. F. Waselewski Construction Co., Phoenix, Arizona 65.49
Dr. Wilkinson, 925 E. McDowell, Phoenix, Arizona 5.05
Mr. Wolfe, 1014 N. Central, Phoenix, Arizona 1.75
E. S. Walker, 503 E. Willetta St., Phoenix, Ariz. 4.10
D. A. Wagner, 302 E. Pierce St., Phoenix, Ariz. 6.35
Western Builders, Phoenix, Arizona 1.75
Mrs. John Webber, Phoenix, Ariz. 1.85
T. B. Williams, Phoenix, Arizona 2.00
Mr. Yeager, 544 E. Lynwood St., Phoenix, Arizona 25.05
J. Zurite, 233 E. Jefferson St., Phoenix, Arizona 6.08

[247]

Schedule B.–3–D

UNLIQUIDATED CLAIMS.

Backowitz Apartments, Phoenix, Arizona, Mechanic's lien filed and being foreclosed. Estimated.....2,600.00

O. R. Bell, Phoenix, Arizona. Job 12th Ave. and Van Buren St..... 149.66

O. R. Bell, Phoenix, Arizona. Job 23 W. Monroe St. Phoenix, Arizona..... 287.91

W. H. Brown Contractor State Hospital for the Insane; Contract and extras $7270.05, credits $4,080.00, balance assigned May 7, 1929, to Standard Sanitary Mfg. Co., Phoenix, Arizona.....3,190.05

James Barnes, Phoenix, Arizona, Latham Street Job, Assigned to Crane Company 71.49

Cabel Job, Phoenix, Arizona, 7th & Desert Sts. Charges $190.60, credits $25.00; thinks another $25.00 payment made but not credited, about..... 140.60

City of Phoenix, New City Hall. Contract $23,233.85, credits $14,526.00, balance assigned to Standard Sanitary Mfg. Co., Phoenix, Arizona, on May 7, 1929.....8,707.85

This job taken over by Southern Surety Company, bondsman, for completion.

Eagan Construction Co., Phoenix, Arizona; deanery for Trinity Cathedral..... 238.90

Elliott Engineering Co. Contract on Washington School; Contract and extras $714.05; Owes Elliott Engineering Company about $2600.00 over and above this amount 00.00

Green & Hall, contractors, Phoenix, Arizona, Dan Campbell Job; Charges $1597.55, credits $900.00, balance

$697.55; $500.00 assigned to Crane Company, balance 197.00

Green & Hall, Phoenix, Arizona; Old residence; extras 11.50

Green & Hall, Phoenix, Arizona, W. W. Knorpp residence; charged $3107.98; credits $2930.30; balance 177.68

Green & Hall, Phoenix, Arizona, Dowell Contract 254.00

Green & Hall, Phoenix, Arizona, E. J. Bennitt Residence. Balance due, estimated 1,968.86

Green & Hall, Phoenix, Arizona, Schwenker Residence. Contract $2934.00, credits, $1300.00; balance, $1634.00. Job taken taken over by Massachussets Bonding Company for completion at cost of about $300.00; balance about.....1,334.00

Balance assigned to Crane Company.

Harvey & Reed, Contractors Washington School Charges 69.08

Litchfield School District, Litchfield School. Contract & Extras, $2077.70; credits $2020.00 balance 57.70

[248]

Schedule B.–3–D.

Unliquidated claims—Continued.

Hagan & Farmer, Contractors, Marana Teachers College, Marana, Arizona, balance due about..... 100.00

Mesa Bank Building, Mesa, Arizona. Don't know. Looks like overpaid.....

E. W. Michael, Phoenix, Arizona; balance due 135.50

H. A. Patterson, Contractor, Res. 355 E. Palm Lane 42.54

Wm. Pepper, Contractor, Lutheran Church, charges $594.50, credits $297.25; offset by what *oews* Pepper..... 00.00

Phoenix Union High School District, Phoenix, Arizona; Central Heating Plant; contract and extras $29,326.10; credits $25,819.00, balance assigned May 7, 1929, to Standard Sanitary Mfg. Co., Phoenix, Arizona 3,507.10

Job taken over by Massachussets Bonding Company for completion.

Phoenix Union High School District, Phoenix, Arizona; Junior College Building; contract and extras $8,424.00; credits, $6,318.00, balance assigned to Standard Sanitary Mfg. Co., May 7, 1929.....2,106.00

Job still uncompleted.

Phoenix Union High School District, Phoenix, Arizona; Library and class room building; contract and extras $18,860.12; credits $9,450.00; balance assigned May 7, 1929, to Standard Sanitary Mfg. Co., Phoenix, Arizona 9,410.12

This job taken over by American Bonding Company for completion.

Joe Samardo, Phoenix, Arizona; balance due 60.00

Southern Prison Company, contract on city Hall 375.00

J. W. Tucker, Contractor, Phoenix, Arizona, Mel Fickas residence, about..... 100.00

Mr. Taylor, 2021 Elvarado St., Phoenix, Arizona 166.25

Yuma High School District, Yuma, Arizona; Contract $5717.00; credits $2997.-08; This job taken over by Massachusetts Bonding Company for completion 00.00

[249]

SCHEDULE B. (4)

PROPERTY IN REVERSION, REMAINDER OR EXPECTANCY, INCLUDING PROPERTY HELD IN TRUST FOR THE DEBTOR, OR SUBJECT TO ANY POWER OR RIGHT TO DISPOSE OF OR TO CHARGE.

(N. B.—A particular description of each interest must be entered. If all, or any of the debtor's property has been conveyed by deed or assignment, or otherwise, for the benefit of creditors, the date of such deed should be stated, the name and address of the person to whom the property was conveyed, the amount realized from the proceeds thereof, and the disposal of the same, as far as it is known to the debtor.)

General Interest.	PARTICULAR DESCRIPTION	Supposed Value of My Interest	
		Dollars	Cents
Interest in land.	None.		
Personal Property.	None.		
Property in money, stock, shares, bonds, annuities, etc.	None.		
Rights and powers, legacies and bequests.	None.		

Total.....

Property heretofore conveyed for the benefit of creditors.	See Schedule A–2—showing assignments of contracts.	Amount realized from proceeds of property Conveyed
What portion of debtor's property has been conveyed by deed or assignment, or otherwise, for benefit of creditors; date of such deed, name and address of party to whom conveyed; amount realized therefrom, and disposal of same, so far as known to debtor.	None except as above stated.	
What sum or sums have been paid to counsel, and to whom, for services rendered or to be rendered in this bankruptcy.	None.	
	Total.....	

(Full sets of schedule blanks must be filed. If there are no items applicable to any particular blanks, such fact should be stated in said blank. Each schedule sheet must be signed.)—Rule 14.

LEO FRANCIS, Petitioner. [250]

SCHEDULE B. (5)

A particular statement of the property claimed as exempted from the operation of the Acts of Congress relating to Bankruptcy, giving each item of property and its valuation; and, if any portion of it is real estate, its location, description and present use.

Military uniform, arms and equipments.		Valuation Dollars	Cents
Property claimed to be exempted by State laws; its valuation; whether real or personal; its description and present use; and reference given to the statute of the State creating the exemption.	Wearing apparel and ornaments	50	00
	1–Toledo power drive thread cutting machine	100	00
	1 bench vice	25	00
	1–36″ Stilson wrench	2	50
	1–36″ chain tong	2	50
	1 pipe cutter from 2½ to 4″	4	00
	1–claw-hammer		35
	1 ball peon-hammer		50
	1 single jack-hammer		75
	1 monkey-wrench		50
	4 rock points	1	00
	2 cold chisels		70
	1–14″ Stilson wrench	1	00
	1–10″ Stilson wrench		75
	2–18″ Stilson wrenches	2	50
	2–24″ Stilson wrenches	3	00
	1 Trimo pipe cutter from ¼ to 2″	2	50
	1–#1 A. Toledo stocks from 1 to 2″	8	00
	1–#0 Toledo stocks from ⅜ to 1″	5	00
	1–Toledo stocks from 2½ to 4″	15	00
	1 pipe reamer	0	00
	1 brace and bit		75
	1 rod spud wrench	1	00
N. B.—This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months, or the greater portion thereof, immediately preceding the filing of the petition.	Total	427	30

(Full sets of schedule blanks must be filed. If there are no items applicable to any particular blanks, such fact should be stated in said blank. Each schedule sheet must be signed.)—Rule 14.

LEO FRANCIS, Petitioner. [251]

SCHEDULE B. (6)

BOOKS, PAPERS, DEEDS AND WRITINGS RELATING TO BANKRUPT'S BUSINESS AND ESTATE.

The following is a true list of all books, papers, deeds and writings relating to my trade, business, dealings, estate and effects, or any part thereof, which at the date of this petition, are in my possession or under my custody and control, or which are in the possession or custody of any person in trust for me, or for my use, benefit or advantage; and also of all others which have been heretofore, at any time, in my possession, or under my custody or control, and which are now held by the parties whose names are hereinafter set forth, with the reason for their custody of the same.

Books	Contract-book, accounts receivable book, cash-book, time book, etc., in possession of Receiver.
Deeds.	None.
Papers.	All in possession of Receiver.

(Full sets of schedule blanks must be filed. If there are no items applicable to any particular blanks, such fact should be stated in said blank. Each schedule sheet must be signed.)—Rule 14.

LEO FRANCIS, Petitioner. [252]

OATH TO SCHEDULE B.

In the Matter of Momsen-Dunnegan-Ryan Co. et al., Petitioners, vs. Phoenix Plumbing and Heating Company, et al., Alleged Bankrupts. In Bankruptcy. No. B.–522–Phoenix.

United States of America,
Federal District of Arizona,—ss.

On this —— day of September, A. D. 1929, before me personally came Leo Francis, one of the persons mentioned in and who subscribed to the foregoing Schedule and who being by me first duly sworn, did declare the said Schedule to be a statement of all his estate, both real and personal, in accordance with the Acts of Congress relating to Bankruptcy.

LEO FRANCIS.

Subscribed and sworn to, before me, this 17th day of September, 1929.

[Seal] O. E. SCHUPP,
Notary Public.

My commission expires February 15, 1932. [253]

SUMMARY OF DEBTS AND ASSETS.

From the statements of the bankrupt in Schedules A and B.

		Dollars	Cents
Schedule A.	1. (1) Taxes and debts due the United States..	None	
	1. (2) Taxes due States, Counties, Districts and Municipalities	322	91
	1. (3) Wages	169	00
	1. (4) Other debts preferred by law.....		
Schedule A.	2. Secured claims	48,136	44
Schedule A.	3, Unsecured claims.....	21,943	24
Schedule A.	4. Notes and bills which ought to be paid by other parties thereto.....		
Schedule A.	5. Accommodation paper		
	Schedule A, Total	70,571	59
Schedule B.	1. Real Estate		
Schedule B.	2. a Cash on hand		
	2. b Bills, promissory notes, and securities...		
	2. c Stock in trade	3,500	00
	2. d Household goods, etc.	50	00
	2. e Books, prints and pictures.....		
	2. f Horses, cows and other animals.....		
	2. g Carriages and other vehicles	400	00
	2. h Farming stock and implements.....		
	2. i Shipping and shares in vessels.....		
	2. k Machinery, tools, etc.	177	30
	2. l Patents, copyrights and trade-marks....		
	2. m Other personal property		

Schedule B.	3. a	Debts due on open accounts.....	3,724 24
	3. b	Stocks, negotiable bonds, etc.	
	3. c	Policies of insurance	00 00
	3. d	Unliquidated claims	35,658 79
	3. e	Deposits of money in banks and elsewhere	
Schedule B.	4.	Property in reversion, remainder, trust, etc.	
Schedule B.	5.	Property claimed to be exempt.....$427.30	
Schedule B.	6.	Books, deeds and papers	
		Schedule B, Total.....	43,510 33

(N. B.—This summary Blank must be filled out and properly footed.)

LEO FRANCIS, Petitioner. [254]

Back of Exhibit:

No. B.–522.

U. S. District Court, Federal District of Arizona, Phoenix Division.

In the Matter of MOMSEN-DUNNEGAN-RYAN COMPANY et al.,

Petitioning Creditors,

vs.

PHOENIX PLUMBING & HEATING COMPANY et al.,

Alleged Bankrupts.

PETITION AND SCHEDULES.

O. E. SCHUPP,
Attorneys for Bankrupt.

(P. O. Address)
507 Luhrs Bldg., Phoenix, Arizona.

Filed Sept. 18, 1929. C. R. McFall, Clerk, United States District Court for the District of Arizona. By Archie L. Gee.

Report of Special Master. Filed Feb. 18, 1930. C. R. McFall, Clerk, United States District Court for the District of Arizona. By F. H. Schlittler. [255]

Whereupon Petitioners' Exhibits 1 to 9, inclusive, and No. 12 for Identification, were received in evidence and marked Petitioners' Exhibit 7 in Evidence, all as one exhibit. These exhibits are of such a nature that copying is impossible, and the originals are filed with this record.

TESTIMONY OF LEO FRANCIS, FOR PETITIONING CREDITORS (RECALLED).

(Examination by Mr. BIRDSALL.)

I came to Phoenix October, 1927. Lived in Oklahoma and Arkansas previously. Worked there for D. L. Francis, my brother, who had a business there. He came here 1st of September, 1927. I came October 18th, 1927. He started the business known as Phoenix Plumbing & Heating Company for me. I had $1,800.00, Lyon put in $1,100.00 for my father. D. L. Francis put in nothing. $2,000 was originally put in business. Paid Remsbottom $3,600.00 for the business. D. L. Francis bought it for me before I came. I was sole owner. Lyon put in the $1,100 for my father. It came from Lyon but through my father. D. L. drew $55.00 per week and expenses for getting work, that is rustling jobs and car expenses on trips. It was understood he was running business and had right to draw out money as he needed it. Dee is his only name. He wrote name D. Leo so I could sign too. That is his signature (referring to Petitioners' Exhibit 2 in Evidence) but my name. We were going to have joint name. This (Petitioners' Exhibit 3 in evidence) is Dee's signature. Dee had financial troubles before he came here. He did not make assignment for benefit of creditors in Fort Smith. He came here for his wife's health. I did not take $55.00 per week, took what I needed. I furnished money and let him run it at same salary I got. We

(Testimony of Leo Francis.)

did not all draw same salary. I got least. From $10.00 to $55.00 per week. During last seven months I got $55.00, Lyon got $55.00, Dee was getting $45.00. He also got his rent. His salary was carried in his wife's name. She got it every Saturday. I know nothing about books. I had bookkeeper. I hired him April, 1928. He left June, 1929. Then I [256] hired Leo Fretz. Dee left in May or June. Lyon got $1.25 per hour. Dee $55.00 per week and expenses. First I took $10 a week, then $40 and then I took $55. Had one checking account in bank for which Dee signed checks. Gehres countersigned them. I did not sign checks. Dee had separate check book. He had authority to draw checks. Lyon and myself did not. I don't know what he drew in 1929. I did not keep account of what he, D. Francis, drew from business or see what he was drawing out. I never examined books. I left that to Dee and Paul. In June I talked the situation over with Nihel and decided to let Dee go. He was not running business right. Creditors began to holler in March. I didn't think the business was going right; it kept on getting worse all the time. I talked it over with Nihel who advised me to let Dee go about the 1st of April, after the explosion. It had been discussed and I talked to D. L. before the explosion.

Q. They put the Phoenix Plumbing & Heating Company on a cash basis, did they? A. Yes.

Q. During April? A. Yes, ma'm.

Q. How long did that continue?

(Testimony of Leo Francis.)

A. Until about May, and then they gave them open account again.

Q. What was the understanding when they gave you open account again?

A. Mr. Fryberger was in there then with me.

Q. Did he come in the first of June?

A. Yes, the first of June; that was the time we began to have open account again.

Q. You gave some assignments to the Standard Sanitary [257] Manufacturing Company in May, didn't you? A. Yes.

Q. On the High School job and Central Heating Plant job? A. Yes.

Q. Did you make them, or did D. L.?

A. I made one or two,—no, I didn't make any on the Central Heating Plant; I made one on the Junior College.

Q. On the 7th of May? A. About that time.

Q. When you made those assignments, did the Standard Sanitary Company put you on open account again? A. Yes.

Q. That was why you made the assignments?

A. Yes.

Q. After the explosion they put you on a cash basis until you made the assignments?

A. There were several assignments made. When we would get in a pinch for material, and if he was uneasy, he took an assignment to help him out and we would go ahead and get our material.

Q. But he did put you on a cash basis for several weeks?

(Testimony of Leo Francis.)

A. We would not have to pay cash; we would have to pay at the end of each week.

Q. And they were not carrying you on open account as they had formerly? A. No.

Walter Godman is a repairman, no relation to me. We had four trucks, let him take one home because we had no room. I didn't give him a conditional sales contract. Godman never paid me anything for truck. Marie Francis, my sister worked in shop as bookkeeper. Mrs. Godman came for her husband's [258] checks. I employed Fryberger about June 1st when D. L. left. Mr. Nihel recommended him as an estimator and manager. I paid him $250 per month. Fretz $150.00 per month. Gehres started at $125; later we gave him $175 per month. Gehres kept books, looked out for bonds, had charge of office work, was good at figures and all round man. He had no money in business. D. L. said he borrowed some money off him at one time. I am not interested in the Arizona Garment Co. I don't know about D. L. D. L. worked at Garment factory a couple of months, but not now. I don't know if Phoenix Plumbing & Heating Co. borrowed money from Joe Thomas. He is distant cousin of mine. Not relative of D.'s wife. Father got money, a check of company, $12 each per week, and a third was paid by each of us boys. He did not work in business. On August 17 I owed about $40,000, at time petition in Bankruptcy was filed. Ledger and accounts receivable were not destroyed in explosion. We had several lists Mr. Fretz took

(Testimony of Leo Francis.)

off books, what we owed. We only could take from invoices. All books could not go in safe. Gehres had some of books home with him that night. He came in next morning with books. I did not know of explosion till next day. Explosion was on Sunday night. There were twelve keys to shop. I left Saturday noon. Don't know who was there when I left. Work on Bachowetz Apartments was done in April, 1928. I put lien on property December, 1928. Never got anything out of it. We thought it worth something in April, 1929, though the suit had been pending at that time for several months and the building was standing vacant and is not completed. All I know is that I did not get anything out of it. I had no property August 17, 1929, and the company had not enough money to pay bills on that date. [259] No property owned by any of us. Dee has a car. Dee turned his property and book accounts in Arkansas to Crane Co. about two months before he left there in 1927. Crane Company was his only creditor to speak of. I don't know what he owed back home. I asked a few questions around the shop after the explosion last April. All that were there were Dee, Gehres and Lyon. I did not talk to policemen or go to headquarters to ask investigation. Dee didn't either.

Q. How do you know Dee talked to the police?

A. I was in the shop that morning when the police was there.

Q. That was Monday morning? A. Yes.

(Testimony of Leo Francis.)

Q. You don't know whether he went to the station or not? A. No.

Q. Along about the 11th of July, did you have some conference with Mr. Fryberger and with Mr. Nihel in regard to making an assignment of all the property of the Phoenix Plumbing & Heating Company to Mr. Fryberger?

A. To Mr. Fryberger?

Q. Yes. A. No.

Q. Didn't you know that at that time an assignment was drawn up,—didn't you have some conferences about it? Wasn't it understood that an assignment was to be made? A. No.

I know nothing about this assignment. (Petitioners' Exhibit No. 11 for Identification.) I did not talk to anyone about it. I did arrange with Fryberger to give him one-third of the business if he pulled it out of hole. I did not hear of assignment to Fryberger in July. Fryberger said he could pull the business out in 11 or 12 months' time, and I [260] said if he did we would give him a third interest.

(Examination by Mr. DUFFY.)

In August I had shop, equipment, trucks, tools, etc., and contracts upon which money was due which if completed would bring in more than $40,000. Trucks worth $600 to $800, equipment, tools, material, etc., $4500. Standard Sanitary agreed to give us credit until we would realize on all our contracts. Crane Co. did not. They refused to

(Testimony of Leo Francis.)

help us that way. The Bank agreed to let us pay our bills after Fryberger came there.

Q. In April—on the 1st of April you weren't having any trouble then in meeting your accounts and making payments from time to time, were you?

A. Well, we were getting on all right for material at that time and on our labor.

Q. You were meeting all your obligations then within a reasonable time after they became due?

A. We weren't paying anything outstanding then.

Q. But you were paying on the outstanding things from time to time? A. Yes.

Q. At that time you were getting on all right and nothing to worry about? A. Yes.

All the assignments to Standard Sanitary were not made after explosion, some before. We gave assignment on City Hall job to Standard Sanitary on Nov. 5, 1928. Yuma High School on April 26, 1929. From 1927 on we gave assignments to Standard Sanitary on big jobs. I started High School Library job in August, 1928. The Heating Plant job in July, 1928. The real reason Standard Sanitary put me on cash [261] basis seemed to be because they did not think my manager was a good man. Only two or three assignments to Standard Sanitary were made after fire.

They were made on May 7th, 1929, and we were on open account before and after that date. In conference with Nihel and Fryberger it was agreed in June that we were sound financially in June, 1929. Fryberger went to work to cut out unneces-

(Testimony of Leo Francis.)

sary expense and pay off indebtedness from month to month. Only bad management blamed, no talk about having to go out of business. Mr. Fryberger began to get results for a while but the Bank bothered him so he did not have much time to work and Nihel took up with Bank need of leaving Fryberger alone to work. I filed lien on Bachowetz job and it has never been settled. At time Receiver was appointed I had five contracts, all public buildings and about the same number of small private contracts, and a lot of small jobs that weren't contract.

(Examined by Mr. PHLEGAR.)

I am sole owner of Phoenix Plumbing & Heating Company. I bought it from Remsbottom in October, 1927. I was then in Oklahoma. My brother Dee acted for me. I gave him power of attorney, this is it. (Bankrupt's Exhibit No. 1 in Evidence.) Dee got bill of sale from Remsbottom. Dee or Lyon did not have any interest in business, don't have any now. Dee was manager, Lyon worked for me. I paid him $1.25 per hour. If there was no work, he went home. Dee was manager until Fryberger supplanted him. Fryberger went in in June. I made agreement with Fryberger for third interest if he could pull the business out. Dee or Lyon had nothing to do with it. Our bookkeeper Gehres was a lawyer. He [262] looked after our legal business. He prepared and filed certain liens for us. I never told him that the three brothers were partners. After Bachowetz liens were filed Gehres found that affidavit of partnership was necessary to sup-

(Testimony of Leo Francis.)

port them. Afterward he prepared an affidavit of sole ownership which I signed and he told me it was recorded.

(Examined by Miss BIRDSALL.)

I went to Mr. Dains about Bachowetz apartments. I had other liens. They were not all filed as partnership liens. There were two or three of partnership. Mr. Dains drew up the affidavit. I was not there. Gehres explained partnership to Dains, so Mr. Dains told me. Bachowetz contract was $3,700 on books—$2,600 worth done at time job stopped. That is the amount of lien. We stopped because carpenters and everybody left the job and we couldn't go any further with it. I sent power of attorney to Dee in April, 1928, because I was at home with my mother until April in Oklahoma. Our attorney in Oklahoma drew it up. At the time of petition in bankruptcy was filed City Hall Job was finished. I testified this morning in answer to Mr. Duffy's question I had High School, Library, Central Heating Plant and Yuma High School job at time of petition and that I was stopped from finishing them by petition. It was true that one job was taken over by Bonding Co. and I did not have money to finish at that time. I don't know whether Standard Sanitary Company notified Bonding Company on City Hall job in August, that I could not pay bill and demanded $16,000.00 payment from them.

Q. You were not prevented from finishing these

(Testimony of Leo Francis.)

jobs by the filing of the petition, but by the lack of money and credit, weren't you? A. Yes.

Q. And the filing of the petition in bankruptcy didn't stop [263] you, did it?

A. It stopped me.

Q. You couldn't get credit before that, could you? A. I couldn't get material.

Q. That was before the petition was filed?

A. We worked until three or four days before the petition was filed.

Q. On what job?

A. On the Ross job and the Mexican Church and the O. P. Johnson job.

Q. Yes, but on these larger jobs, I mean? You could not get material? A. That is correct.

Q. That was some time before the petition was filed, wasn't it? A. At least two weeks.

Q. When did the Standard Sanitary Company stop your credit on the Yuma building?

A. About the 15th of August.

Q. Had they not, some weeks before, refused to send you material there?

A. No. Mr. Nihel had me send my brother down and then there was a mistake on some of the fixtures.

Q. How long was that before the petition was filed? A. I would say about three weeks.

Q. You testified a while ago that you owed the Standard Sanitary Manufacturing Company more in August than you did in April. A. Yes.

Q. When you make that statement, are you taking into consideration that in June the Standard

(Testimony of Leo Francis.)

Sanitary Company got a [264] credit of $13,000; isn't it true that you really owed them more in April than in August? They got $13,000 from the Lincoln Mortgage Company in June, didn't they?

A. Yes.

Q. And they reduced their account by that amount? A. Yes.

Q. And in April of 1929 you owed them a balance of considerably more than in August, didn't you?

A. I wouldn't say.

Q. Don't you know that on the 1st of May, 1929, you owed the Standard Sanitary Manufacturing Company $45,335.58?

A. Can you tell me what it was in August?

Q. In August it was $38,563.16. The account at the present time is something like $39,000.

A. I had forgotten about that $13,000.

Q. You wish to correct your testimony, and you really owed them less in August than in April?

A. Yes.

After Fryberger took charge we got credit from Standard Sanitary, but not from Crane Co., but our stock in trade was not increased. We installed some heaters on 14th Street and did repair work. The Safford job was the last big job we got. That was before April 1st. There were no large jobs after that. We had five heaters in five houses $75.00 each. Fryberger was figuring on some big jobs but his bids were too high. There was not a great deal of improvement after he came. But we were going good until creditors began to holler. We

(Testimony of Leo Francis.)

were in debt more after Fryberger came. The more we finished jobs the more money we had coming. I could not get the money without spending money to finish contracts. A lot of money was held back for the finish. I would lose [265] contract if I could not get credit to complete it. Without credit, contracts became liability instead of asset. We had no large new contracts after Fryberger went in; Fryberger did not neglect business, but he spent a lot of time at Bank. They had meetings that ran three days at a time, sometimes. That was part of his job. He was trying to adjust matters with Bank so that we could go on. The Bank had unsecured debt of $6,100.00. I did not attend these meetings. I did not have more property in July than in June or April 1st. It ran about the same. The books were in such shape it was hard to determine our exact financial condition. I don't know the condition to-day. I don't know how much D. L. took out of the business of Gehres. I know what I was getting but have not added total up. I can't say exactly what I owed, about $45,000. My assets were about the same. I turned all my papers over to my attorney after petition was filed. The statement I spoke of was the one Fretz took off books about June 1st. That's the date I was talking about. That statement was taken off books. I now know that my condition was practically the same in June as in August, except for material, I had to complete jobs. I know now that statements were incorrect. Conditions in April and

(Testimony of Leo Francis.)

August were about the same. I believed that with Fryberger we could pull the business out, but I had to get credit for that, and if my credit was closed down at that time I was gone. This is contract made with Fryberger. (Received and marked Petitioners' Exhibit 8 in Evidence.) [266]

B.–522.

PETITIONERS' EXHIBIT No. 8.

In Evidence.

AGREEMENT.

THIS AGREEMENT, made this 7th day of June, 1929, between Leo Francis, of Phoenix, Arizona, hereinafter called "Employer," of the one part, and Cliff B. Fryberger, of Phoenix, Arizona, hereinafter called the "Manager," of the other part.

WITNESSETH.

(1) The employer shall employ the manager for the term of fifteen months from date hereof as manager of the employer's business as a dealer in plumbing and plumbing contractor, now carried on at No. 316 North 6th Avenue, in the City of Phoenix, Arizona, subject to the determination as hereinafter provided.

(2) The manager shall well and faithfully serve the employer in such capacity as aforesaid, and shall at all times devote his whole time, attention and energies to the management, superintendence and improvement of the said business to the utmost of his ability and shall conduct said business for the

protection of the creditors of the Phoenix Plumbing & Heating Company, owned by employers and perform all such services, acts and things connected therewith as the employer shall from time to time direct with the consent of the creditor of the Phoenix Plumbing & Heating Company and as are of a kind properly belonging to the duties of a manager of such business.

(3) The manager shall not divulge any matters, relating to said business or to the employer or to any customer which may become known to the manager, to any competitors by reason of his employment, or otherwise, save insofar as may be necessary to the interest of said business.

(4) The manager shall keep or cause to be kept all such books of accounts or other books as shall be needed for that purpose, and shall enter or cause to be entered therein the usual accounts or particulars of all goods and things bought and received and sold or delivered upon credit, or otherwise, in the course of the said business, and shall at all times render to the employer and creditors accurate accounts and full [267] statements of and concerning said business. Said books shall at all times be open to the inspection of the employer and his agents in that behalf.

(5) All moneys received by the employer, except such sum as shall be required to be paid to "petty cash" shall be deposited to the account of the Phoenix Plumbing & Heating Company in a local bank at Phoenix, Arizona, if possible on the date of receipt, and every payment in excess of $10.00 shall be made by check drawn on such account. The

manager shall not draw, or accept, or make any bill of exchange or promissory note on behalf of the employer or otherwise pledge his credit except so far as he may have been thereto authorized by the employer.

(6) The employer shall pay to the manager a salary of $250.00 per month, semi-monthly, in installments of $125.00 each, on the 1st day of each month and the 15th day of each month; and at the expiration of the fifteen months, if the business of the Phoenix Plumbing and Heating Company is in a solvent condition, said manager to receive a third interest in addition to the above salary, for his services.

(7) The manager shall only have authority to sign all checks and receive moneys due the Phoenix Plumbing & Heating Company, and the manager shall furnish a surety bond to the employer in the amount of $5,000.

IN WITNESS WHEREOF, the parties have hereunto set their hands, the day and year first hereinabove written.

LEO FRANCIS.
CLIFF B. FRYBERGER. [268]

State of Arizona,
County of Maricopa,—ss.

Before me, Caroline Helms, a notary public in and for said County and State, personally appeared Leo Francis and Cliff B. Fryberger, known to me to be the parties named in the within and foregoing instrument, and each for himself acknowledged

(Testimony of Leo Francis.)

to me that they executed the same for the purposes and considerations therein expresses.

CAROLINE HELMS,
Notary Public.

My commission expires: Sept. 18th, 1932.

The above agreement is approved by me this 7th day of June, 1929.

_____

_____

_____

[269]

Mr. Nihel recommended Fryberger. He worked for us in 1928 for six months. We talked about Fryberger in May from time to time and before the explosion. The agreement (Petitioners' Exhibit No. 8 in Evidence) I don't know who was to approve it. No one else but Nihel spoke to me about Fryberger. Crane Co. and Momsen-Dunnegan-Ryan know about the employment of Fryberger. The Bank knew it when he came in, don't know if they knew it before. I didn't take it up with other creditors. Bank, Crane Co. and Standard Sanitary were biggest creditors. Crane Co. and Standard Sanitary had a number of assignments but the Bank is unsecured. I had to give bonds on most of my contracts. The ones assigned to Standard Sanitary and Crane Co. were bonded, but not all, however. I suppose the books will show what D. L. drew since September, 1927. I will look at books but am not much of a bookkeeper. Paul brought forward figures after explosion, so I understand. Paul said so. I don't know how. I

(Testimony of Leo Francis.)

don't know whether there is any record of what Lyon and I drew. I can't tell exact amount. During July I had conference at Adams Hotel with Fretz and others present. I did not tell Lane we were partners. I said to him that I told boys—Lyon and Dee, that if we did good I would share profits with them. I did not know Lane was trying to determine our credit. Sometimes I would sign bonds without reading them. I told Lane I signed without reading sometimes. I might be signing away everything. I started business with $1800. Before that I was working as a steamfitter in Arkansas and Oklahoma, earning $8.00 per day. I borrowed $1,100 from my father when Dee came out in August, 1927. Father was then in Calhoun, Oklahoma. I did not [270] give him a note and have paid him back about $700. It don't show on books of Phoenix Plumbing & Heating Co. that I owed him $1,100.00 when I started business. It was in family so I did not show it in accounts payable on statements we made. Father loaned it to me, not all three boys. I only had $800 of my own money. I paid $3,600 for business, paid $1,600 down payment. I turned $1,800 over to Dee in cash. Sent it out by A. B. Midaugh, the latter part of September. My father got money from Lyon. It was indirect from Lyon through father because he would not push me so much. The full $3,600 was paid, the last payment in June, 1929. Paid $150 per month. Don't know if books show these payments. They were made by check. My brother and the bookkeeper had charge of books.

(Testimony of Leo Francis.)

Haven't seen the bookkeeper for two or three months. I paid money back to father. Don't know if he paid Lyon. Notes were taken for it. I sent him money right along; am still paying him. It is not the $36.00 paid him each week by us boys. All the boys were paying that, $12.00 per week of our salary. Dee ran business. If any more money was put in to start business I don't know where it came from. Father and Lyon were not here at first. Lyon started part time at $15.00 per week and his house rent. I came in October, 1927, stayed until December, then went home. I came back in April, I think and have been here ever since. I did not draw wages out of Phoenix Plumbing and Heating Company while I was away. Father was in hardware and furniture business; he sold out about eight months ago. He did not put any money in business here. I paid father the last of $700 two months ago. Paid it in cash out of my earnings. There is no record of it on the books. The last $100.00 was paid in May or June. One time I had account in Citizens State Bank. It was closed early in 1928. Had it four or five months. I have statements and cancelled checks and will try and find them and bring them in. My wife kept the [271] money, she has no bank account. Lyon did not put any part of his wages in Phoenix Plumbing & Heating Co. He did not work anywhere else. He is older than me. I did not know Bonding company took Yuma job before petition was filed. I cannot fix date when it was turned over to the Bonding Company. The Stand-

(Testimony of Leo Francis.)

ard Sanitary sent lots of material down there latter part of July. Library job was taken over in August. We were not stopped by petition in bankruptcy. We were stopped on job by lack of material and money a few days before petition was filed. We worked until shop was closed with what material we had in shop. Our credit had been stopped by Standard Sanitary before that. I talked to Messrs. Nealon, Alexander, Laney and Duffy about voluntary petition before petition was filed. They are attorneys. I also talked with Fretz, Fryberger and Nihel a few days or a week or two before petition. I told them all the story I have here about how business was started.

(Examination by Mr. DUFFY.)

I was born in Oklahoma, my father in Syria. Syrians loan money without notes and such an obligation is binding, especially between relatives. The Murphy job was worth $4,000. Fryberger was called away from shop on conferences with bank. They were after him for security on loans. Mr. Norris of bank said he would leave us alone, but would give no credit. They all agreed that with credit we could take care of everything. Up to early part of August if our work could be turned into cash, we could pay all our bills. The representative of the bank said so, and Standard Sanitary Co. and Crane Co. I talked about bankruptcy to attorneys because I heard that some of my creditors were planning this petition, not because I felt I was bankrupt. If all treated me as Nihel did we would make a go of it, and paid dollar for

(Testimony of Leo Francis.)

dollar. You advised me to [272] keep on plugging. After Fryberger came the bond companies investigated and found nothing to alarm them and we went ahead.

Dee gave Standard Sanitary an order on Lincoln Mortgage Company in 1928. I don't know what date. I knew about it, and agreed to it. I talked to Bowers about assignment and Lincoln Mortgage Company accepted it. Standard Sanitary gave us credit when they collected that $13,000. It was their money after order was given. On June 5th the Lincoln Mortgage Company paid direct to Standard Sanitary. At time assignment was given we only had a little more work to do for Lincoln Mortgage Company. In March, 1929, our account with Standard Sanitary was practically $45,000 and we had given them security to the extent of $13,000 which was to be paid to them direct when the money was paid by the Lincoln Mortgage Co.

(Examination by Miss BIRDSALL.)

The Standard Sanitary gave us credit for the $13,000. The order was $14,196.07, but I don't think they received that amount. The Standard Sanitary received $13,000 in June, and gave us credit. It was merely security until they got the money. I don't know that Lincoln Mortgage Company accepted assignment. I don't know if there was written acceptance. Standard Sanitary gave us credit after they got the money in June. I was not present when money was paid. I don't know the exact date or what books show.

(Testimony of Leo Francis.)

The statement of June 22, 1929 furnished the Bank was taken off books. Fryberger told Fretz how much it would take to finish each job, that's how they got that sheet. It does not show on statement of June 22 how much it would take to finish jobs. I don't know what you mean by net worth, ask Fretz about that. Mr. Fretz helped on all statements. It was statement of July 20th that showed what it would take to finish jobs. Nihel gave figures for material. Fryberger for labor. [273] The one I was talking about was earlier. It was the one that was brought to you. You'll have to talk to Fretz about statement. The statement I talked about balances. One I testified about showed what was needed to finish jobs. Fretz and Fryberger got together and got figures on gross material from Nihell, and Mr. Fryberger estimated labor. I don't know which one they got that for. There are so many statements and I don't know whether this (Respondent's Exhibit "A" for Identification) is the paper or not. Bank hollered more than other creditors. They had unsecured debt. Creditors were calling for papers every day.

Q. The notes were past due, weren't they?

A. Not over 60 days.

Q. Didn't you promise assignments to the bank?

A. No, ma'am.

Q. Didn't they ask you for them? A. Yes.

Q. Why didn't you give them an assignment; you gave them to Crane Co.

(Testimony of Leo Francis.)

A. They had practically played out; there were no more to be given, and these others were furnishing us material.

Q. And you were asking the bank for money for the pay-roll? A. Yes.

Q. Didn't you have to give notes for money to meet your pay-roll? A. Yes.

Q. These other people had bonds as well as materialmen's liens and yet you gave them assignments, and then kicked about the bank asking for an assignment.

A. I wasn't kicking about it; I didn't blame them.

I saw Mr. Duffy in August, before the shop closed, two weeks before petition was filed. Some of the creditors asked about a voluntary petition in bankruptcy and I asked about [274] it between 1st and 3d of August. I drew out of Phoenix Plumbing & Heating Company $400.00 once besides salary. That was close to January, 1929 and was for my personal use.

(Examination by Mr. PHLEGAR.)

Phoenix Union High School District contract was signed by D. F. Lyon and myself to get a bond. Insurance men knew there was no partnership. Nothing was said between me and School District representatives about partnership, or bonding company. I told them we were not partners. It was so understood with first bond we signed. Dee signed Petitioners' Exhibits 1 and 3 in evidence. One signed, Leo and one D. Leo. I did

(Testimony of Leo Francis.)

not have anything to do with either. Dee was my manager, my agent. I never told Bank we were partners. I told them I owned business. From the first, I told Crane Co. I was owner. So, too Standard Sanitary. I never told Momsen-Dunnegan-Ryan or Pratt Gilbert that it was a partnership. I told Mr. Norris (of the Bank) that I owned business, but that I was going to divide profits with my brothers. D. L. and Lyon never contributed to business. I never asked them to. All property of Phoenix Plumbing & Heating Co. was turned over to Receiver. A truck in Godman's possesion is in dispute. Dee's car was never property of Phoenix Plumbing & Heating Co. No one was consulted about contract with Fryberger. The only creditor who knew about it was Standard Sanitary.

(Examination by Miss BIRDSALL.)

Nihell knew I was hiring Fryberger. He recommended him. Mr. Rudd of Standard Insurance Agency can tell you why the bonding company wanted all three to sign the bond. I don't know if bonding company wanted bond signed in untruthful way. The bonds were signed that way, but we were not partners. That's all I know. [275]

(Examination by Mr. SCHUPP.)

I am not a lawyer, bookkeeper, or office manager. I employed manager, my brother, and Mr. Fryberger. I figured on jobs, did not prepare bids, or make entry in books, did not prepare contracts or agreements, The manager and bookkeeper did all

(Testimony of Leo Francis.)

that. All my testimony is based on information obtained from bookkeeper.

(Examination by Mr. PHLEGAR.)

I had full confidence in my manager and bookkeeper and did what they said. Gehres was an attorney and bookkeeper, too.

(Examination by Miss BIRDSALL.)

I knew I was signing articles of a partnership; did not know I was running into all this stuff. I won't say I knew it was articles of co-partnership, I wasn't familiar with that stuff. Gehres was an attorney and for One Hundred Fifty ($150) Dollars per month was both lawyer and bookkeeper.

(Examination by Mr. DUFFY.)

Articles of co-partnership signed in office, before that a lien had been filed by Gehres with Dain's help. Then they discovered we were not co-partnership. They waited until time to file lien was almost over; it was done to make lien good. No thought of creditors, only desire to save Two Thousant ($2,000) on lien for concern.

(Examination by Miss BIRDSALL.)

Mr. Gehres told me to do that; Dains was helping Gehres. I don't think it was in spring or summer that lien was filed, or that I went to Dains in December. The lien would expire in ninety days. Mr. Gehres went to Mr. Dains, so I understood. Gehres did not get information as to partnership from me. He was working there a few months before that time.

TESTIMONY OF LEE FRETZ, FOR PETITIONING CREDITORS.

(Examination by Miss BIRDSALL.)

My name is Lee Fretz. I am a bookkeeper. I worked for Phoenix Plumbing and Heating Company from [276] June 5 to August 15, 1929, as bookkeeper. I had conference in July with Lane of Bank and Nihell to find solution of difficulties of Phoenix Plumbing & Heating Company. The company was in financial difficulties. The claims of creditors were in hands of attorneys at that time. We got letter from Miss Birdsall on behalf of Momsen-Dunnegan-Ryan in June or July. I went to office with a statement dated June 22, 1929. Referring to Respondents' Exhibit "A" for Identification, that is a copy of the statement I gave you at that time, prepared June 22, 1929. I went to your office twice. I told you I would try to find a way to work out this payment of your claim along with others, some of which were old and would work out statement. Later I gave you statement dated June 22. Item of contracts receivable $47,600.64 was taken from contracts receivable book. That book does not show condition of contracts so far as material and labor on each contract was concerned. Did not show amount of labor and material needed to finish contracts. The only part of above item that was an asset was the part completed. No books were kept that would show that or what the company had invested in contracts, or what it would take to finish contracts. The contracts receivable would not be an asset without showing what it

(Testimony of Lee Fretz.)

would take to complete job. Where contract is roughed in, 50% could be collected. Did not have to wait for completion on some contracts. The only way you could tell how much value of job was by estimating. Books showing material and labor used were not kept, but should have been. Liabilities payable, shown on this statement ($46,451.74). The way I arrived at that figure I asked certain large companies the approximate amount of their bill. They were in the accounts payable book, but you could not take the accounts payable book and arrive at that figure, [277] because there were some estimates given me from material houses where I took their estimate. The books were no guide and I had to take what was there. The accounts payable were at least $46,451.74 and they might have been more. Notes payable $6,100 shown is correct. Net worth shown, $5,718.79, would be assets less liabilities and the difference would be shown here. That isn't the proper way to make a statement but that is the way this was made.

I would not make up statement that way if I knew what it would cost to finish job. That amount which was required to finish job would be liability. I overlooked that when I made up statement. I thought contracts receivable were completed contracts. I gave same statement to Lane. Later when I got familiar with books I told him we would have to make new statement and did on July 20 give him a statement showing what actual assets were. It was drawn up at Commercial National Bank. This (Exhibit No. 13 for identification) is the one.

(Testimony of Lee Fretz.)

Mr. Lane and myself made it up. Fryberger estimated labor and he and Mr. Nihel estimated the material necessary to complete various jobs. This is Cash Book I kept in June and July called Receipts & Disbursements. (Pet. Exhibit No. 6 for identification; No. 7 in evidence.) We paid Crane Company $500.00 about June 20th. It came from Hogan and Farmer on Marana School District job; $270.00 went to Crane Co. on July 23d from Barkley job, balance $170.07 to us. Mrs. Barkley paid them and gave us the balance. Contract was for $370.00 and some extras. Payment to Crane Company did not go through Phoenix Plumbing & Heating Company. I tried to collect accounts receivable. As to what percentage of this $3,700—it was really about $3,800, I can't say I collected between June 1st and August 17th, I received two substantial payments. The rest of them would not run over [278] three or four hundred dollars. The Salt River Valley Water Users made payment of $700, and another was made of $100.00, and others were about from three to ten dollars, and of these there were only three or four hundred dollars collected. Those were the accounts as I found them on the books.

Dee Francis was in charge until June 5th, then Mr. Fryberger. Dee came in to visit after June 5th, never in any official capacity and I never saw any payment of money to him.

(Examination by Mr. DRAKE.)

$500.00 on Hogan & Farmer job had been assigned to Crane Co. I was told to pay it that way.

(Testimony of Lee Fretz.)

I know that there was an assignment. I don't know if the Barkley job was assigned. Mrs. Barkley showed me receipt from Crane Co.

(Examination by Mr. DUFFY.)

The time I spent conferring with the bank and Fryberger might have interfered with my collections. There were quite a few unnecessary conferences.

I don't know that I could have collected anything on the accounts. If they were collectible, I could have spent more time on them. On the contracts receivable as to whether when job was roughed in Phoenix Plumbing & Heating Company was entitled to 50% of the contract, and other payments became due, when portions of the work had been installed, that is according to contract. Speaking of contracts in general, there are contracts where you can draw up to 25% of the total. Referring to statement of June 22, 1929 (Respondent's Exhibit "A" for Identification), at the time I submitted that statement to Bank, I also submitted to them statement showing all contracts receivable, amounts already received, and amounts to be paid.

On the statement of June 22, I showed [279] I don't know whether the statements of Crane Co. and Standard Sanitary show what material had been delivered or all that the contracts called for, but what I asked them for was a statement of their account. I didn't know what they were going to need in the future.

(Examination by Miss BIRDSALL.)

I asked them for a statement of amount due June

(Testimony of Lee Fretz.)

22, 1929, and statement given me by Standard Sanitary was very close to the amounts which I knew were already due. I never examined contracts listed in contracts receivable. I know of my own knowledge that 50% of contracts receivable is due when work is roughed in. Some of Phoenix Plumbing & Heating Co. contracts were written to be paid when job was completed. I was only stating generally when I spoke of payments on contracts. I don't know how Phoenix Plumbing & Heating Co. contracts read.

TESTIMONY OF H. FLIEDNER, FOR PETITIONING CREDITORS.

(Examination by Miss BIRDSALL.)

I have been in business six years. I am familiar with plumbing fixtures and supplies and their prices. I made inventory of fixtures and supplies of Phoenix Plumbing & Heating Co. for Mr. Thalheimer the Receiver and put price on them. The total is $2,177.20, our estimate.

(Examination by Mr. DUFFY.)

It is an estimate of plumbing material, does not include safe and office fixtures. Only stuff that could be used on jobs, price fixed on book value less depreciation.

(Examination by The MASTER.)

It is based on what a plumber would pay at a supply house less depreciation on some things, such as lavatories and other fixtures shop worn through use for display. Not much of that stuff there, not over $200.00.

TESTIMONY OF DEE FRANCIS, FOR PETITIONING CREDITORS.

(Examination by Miss BIRDSALL.) [280]

My name is Wolf Dee Francis,—no Leo in my name, no L in it. I signed checks D. L. Francis so that Leo could step into my place when he came out here to take the business. I bought the business for him. I put it D. L. so it would be Leo's initials and cover both names, as a joint name. Leo's name is not D. Leo. I came here about September 1st, 1927. I purchased business October 1, 1927. I came from Fort Smith, Arkansas. I was there five years, in plumbing business, under name Francis Plumbing Co. It was my own business. My wife took T. B. and I turned business to Crane Co. and came here. I did not fail in business. The only creditor I had was Crane Co. I finished job on University of Arkansas, then turned business to Crane Co., owed nothing on business except to Crane Co. I paid some personal bills since I came here. I don't know how much Crane Co. realized on business. I don't owe $6,000 back there. I had one collection started on personal bill since I came. I can't say how much. There may be some bills for plumbing supplies, I don't know anything about. Leo gave me $1,800 to start business with. I had $40.00 of my own. Mr. Midaugh brought $1,800 from Leo in cash about 3 weeks after I came here. I bought business October 1st two weeks after I got Leo's money, from Remsbottom for Leo on contract in the amount of $3,600.00 payable so much down and so much a month. I paid $1,600

(Testimony of Dee Francis.)

down and put Leo's $200 and $500 or $600 from Thomas, a cousin of mine, in the bank. Thomas wired me $400 in Tucson. I got the money from Thomas to put into the company. After we had decided to buy business I tried to get out with smaller payments but couldn't.

There was a written contract with Remsbottom for $4,600 and I paid $1,600 down and either $150 or $125 a month. In fact when I had spare money I paid it to him. I started bank [281] account with $2,100 in my name and Midaugh's.

First Remsbottom wanted $2,000 down and I started Sunshine Plumbing Co. I brought money and Remsbottom refused deal and I wired Thomas for money and he sent $400 or $450.00. Later I made deal with Remsbottom. I conducted Sunshine Co. myself about two weeks. I had no stock, only spent $50.00 on it. I told Thomas I was buying shop for Leo. I did not give him note. Thomas money was a loan to be paid when I got money. He was not to have interest in business. It was carried on books Phoenix Plumbing and Heating Co. from start. I paid Thomas some but borrowed more, four or five times more. I can't give dates. I will have to refer to the books. I don't know what I could find on the books since I was fired. I don't think more than one or two of books were destroyed; think General Ledger was only book destroyed. This ought to be in some of the other books. Referring to amounts and the times I borrowed them from Thomas, one time I made a draft on him for $500. Don't think I bor-

(Testimony of Dee Francis.)

rowed any, up to the first of the year 1929. I don't know how long after that I borrowed this $500. I drew a draft. It should show on the records of the bank. As near as I can recall that was $560 or $660. I got one for $300 and another for $100, but when I don't know. They should be on the books. I can't give the dates. I don't know whether it was before Leo came back in April or not. There were several reasons for borrowing the money. Sometimes the business was prosperous but we got pushed and I borrowed from bank. Don't know whether I started borrowing from bank first month I had an account there. If Mr. Lane's records showed I did, it must be right. There were just three loans made from Mr. Thomas in 1928. I think they were all made in 1928. I think at one time I got $300; at another time I got $100; another time $560 or $660—that was the first [282] loan just prior to buying the business from Remsbottom. I told Leo about loans sometimes, sometimes I did not.

Thomas came to Phoenix in April or May, 1929. He did not work for Phoenix Plumbing & Heating Company, and was not connected with it. He is in Phoenix now, with Arizona Garment Company at 532 West Washington Street. The loans from Thomas were carried on books of company. I guess the Thomas loan was included in my first statement to bank on October 15, 1927, in this (indicating on statement) Two Thousand Six Hundred Seventy ($2,670.00) Dollars. We paid Remsbottom Sixteen Hundred ($1600.00) out of Thirty-

(Testimony of Dee Francis.)

six Hundred ($3600.00). We were paying Remsbottom interest. I have contract with Remsbottom here; it ought to be in shop; it was not recorded; it was just a contract. I don't know date it was paid out, but my brother has bill of sale. I don't think Remsbottom had mortgage. I won't swear I did not owe Remsbottom Two Thousand Six Hundred Seventy ($2,670.00) Dollars at the time I made this statement of October 15, 1927 or anything else that happened two years ago. I listed whole liability at Two Thousand Six Hundred Seventy ($2,670.00) Dollars and don't know whether I called it Remsbottom or not. That is my writing—the signature, not the rest (on paper shown witness). (Petitioners' Exhibit No. 2 in Evidence.) This statement signed April 2, 1928 (Petitioners' Exhibit No. 3 in Evidence) bears my signature. I signed it Leo Francis. I told bank I was not Leo at that time. The chattel mortgage of Seventeen Hundred One ($1701.00) Dollars may have been Remsbottom's. There may have been other notes included in Thirteen Hundred Fifty ($1350.00) Dollars payable to Bank. I told Bank all about them. Thomas indebtedness was carried on "open accounts" Thirty-nine Hundred Seventy ($3970.00) Dollars, same as merchandise. I did not mention Thomas' name to bank. I might have told Leo about owing Thomas money—I did not tell him every time I [283] borrowed; gave Thomas no note. I paid interest. If I borrowed One Hundred ($100.00) Dollars I'd pay One Hundred Five ($105.00) Dollars, ans so on. If I did not have it, I did not pay it.

(Testimony of Dee Francis.)

Thomas was paid up mostly last April, 1929, about time he came out here. Books will show how much; it should be in ledger. He was paid some after ledger was destroyed. It should also appear in other books. The books were carried as any other set of books. I drew Forty-five ($45.00) Dollars per week practically all the time from September, 1927. I also paid doctor's bills and hospital; it was all charged to me. I don't know how much I drew. I was to get Thirty-two Hundred Fifty ($3250.00) Dollars per year, Forty-five ($45.00) Dollars per week and my house rent; also my expenses on road estimating and checking jobs. I signed checks, Leo did not. There was no limit to my checking account.

Q. Is there an account on the books showing your account with the Phoenix Plumbing & Heating Company since 1927? A. There should be.

Q. Do you know whether there is? Was there such an account when you left in June?

A. I cannot swear to that.

Q. Did you ever see your account? A. Yes.

Q. Such an account was kept? A. Yes.

Q. And everything was charged against your account? A. Yes.

Q. What balance is owing to you at this time from the Phoenix Plumbing & Heating Company, or did you settle that when you went out?

A. I went out with the understanding that the business was to go on; I did not tally up to find out how much I had coming. [284]

Q. Did you take any money when you left?

(Testimony of Dee Francis.)

A. No.

I took One Hundred Sixty ($160.00) Dollars in cash when I left; I don't think it was charged on books—it was on books, but not against me. I gave it to my father; the company owed him Sixty ($60.00) Dollars, so I got One Hundred Sixty ($160.00) Dollars and gave it to him. It shows on books. It was cash borrowed; the books will show when it was put in. Father loaned Two Hundred ($200.00) Dollars, the books will show that. I'll try to find them on books; it's all there. I never borrowed from father before. I got Eighteen Hundred ($1800.00) Dollars from Leo and paid for business with it. No account carried showing money owing to father from Leo or anyone else prior to this $200.00. The cash book should show that I drew Forty-five ($45.00) Dollars per week during last six months. January 1, 1929, to June, 1929. My wife drew it. I had expense money besides that. All that I drew for anyone else is on books. I had sixty-seven men to look out for. I cannot testify to amounts, or that I drew any, it's all in the books; I had plenty to worry about.

I paid Thomas back some money; he was the Arizona Garment Company; I may have issued checks to both. I think there was an account with the Garment Company. After I left they might have burned books up. Payments to the Garment Company were made after explosion. I can't say whether money was paid to one or other. Thomas or company, you have the check stubs. I don't

(Testimony of Dee Francis.)

think there was any payment to others from January 1 to June 1, 1929, outside regular course of business. I paid only wages to Gehres. When I left shop I always signed blank checks and left them with him, and he countersigned them. If any big checks were drawn, I don't know about them. One time he deposited check for Twelve Hundred ($1200.00) Dollars [285] and drew it out a few days after; 'twas in 1928 or 1929, don't know whether it was before or after explosion. I think before. I was out of town; he deposited check to cover shortage in Bank. When I got back I saw deposit and gave him Twelve Hundred ($1200.00) Dollars back. His salary was One Hundred Twenty-five ($125.00) Dollars first, then One Hundred Seventy-five ($175.00) Dollars. I did not see his check for $1,200.00; saw deposit slip. I did not look through check book to see what he drew; thought he was honest man. He and I signed checks, but I had my own personal check book, but he countersigned it. When I was out of town and needed money, I could make checks. I don't think any other amounts were drawn out save regular expenses. The Shayab check for Two Hundred Five ($205.00) Dollars was money I borrowed from him some two or three weeks before the date of check. Shayab lives at Jefferson Hotel. He does not do anything; has money. The loan shows on books as an account. I think you'll find that check deposited in bank; you can trace deposit on slips two or three weeks before April 1, 1928. I bor-

(Testimony of Dee Francis.)

rowed more off him late 1928 or early 1929; don't know how much; all short loans. You'll find it in stubs or deposits. I would tell him how much I wanted, say Two Hundred ($200.00) Dollars, he would write check and I would give check dated two or three weeks ahead—no note was given. The account was given to bookkeeper, he should have put it on books. I'd give him check, says this is to cover shortage, showed it to him as loan, and told him about check I had given. Don't know when I made last Shayab loan; don't think any after explosion; won't be positive, should be on books. Shayab is still in Phoenix. I think he leaves in summer, comes back in winter. He is at Jefferson when in town. That check for Ten Hundred Fifteen ($1015.00) Dollars to Shayab dated May 10, 1929, after explosion, [286] was borrowed same as others. It should show in books. It doesn't show on statements to obtain credit, but bookkeeper was always notified of it.

(Shayab checks introduced in evidence, Petitioners' Exhibit No. 9.) [287]

(Testimony of Dee Francis.)

B.–522.

PETITIONERS' EXHIBIT No. 9.

In Evidence.

Cancelled Checks.

No. F.–106. The Commercial National Bank, Phoenix, Ariz.

April 1, 1928.

Pay to the order of Walter Shayeb $205.00—Two Hundred no/100 Dollars.

PHOENIX PLUMBING & HEATING CO.
D. L. FRANCIS.

DLF.

Endorsed on back: WALTER SHAYEB.

No. F–75. The Commercial National Bank, Phoenix, Ariz.

May 10, 1929.

Pay to the order of Walter Shayeb $1015.00—One Thousand and fifteen no/100 Dollars.

PHOENIX PLUMBING & HEATING CO.
D. L. FRANCIS.

PAUL E. GEHRES.

Endorsed on back:

WALTER SHAYEB.
HOWARD O. NORKMAN. [288]

Check for One Hundred Twenty-five ($125.00) Dollars dated May 2, 1929, to Joe Thomas must be for payment on loan I owed Thomas or stock I bought on contract. All my checks were on company, then at end of year I'd settle it. I did not

(Testimony of Dee Francis.)

settle up on Thomas account because I did not finish year; they put me out; I had no chance to make accounting and had no accounting as to what I owed firm. I don't know whether they *they* owed me or I owed them. I drew salary up to day I left. Check dated May 24, 1929, was for same thing, both for stock in Arizona Garment Company; shows on Thomas account in books, or should. Check dated May 16th for Two Hundred Fifty ($250.00) Dollars was for same thing.

I bought Fourteen Hundred ($1400.00) Dollars stock in Arizona Garment Company when the Garment Company was organized. I had ten or eleven thousand dollars of government insurance. I borrowed One Thousand ($1,000.00) Dollars on that and deposited it to the credit of Phoenix Plumbing and Heating Company; came in three payments, one on my pension of Fifteen Hundred ($1500.00) Dollars—I got Two Hundred ($200.00) Dollars, one was for *$6,000.00* Dollars, one for *$4,000.00* Dollars, all together it made up One Thousand ($1,000.00) Dollars that I got. I applied for it in March and it came in three different checks; went to credit of Plumbing Company, and I drew on it. I bought Fourteen Hundred ($1400.00) Dollars worth of stock against the One Thousand ($1,000.00) Dollars. I have no personal checking account. I had one when I first came here in Commercial National under name D. Francis. Had none in any other place. Check for One Hundred ($100.00) Dollars, dated May 22, to Thomas Was for stock.

(Testimony of Dee Francis.)

Check dated April 12, to Thomas for One Thousand ($1,000.00) Dollars was for stock, but not for myself, for another party, C. T. Calloway, with money [289] he gave me in January. They were selling some material at Westward Ho hotel, some fittings left over. I was keeping about One Thousand ($1,000.00) Dollars for Calloway in safe. When this man wanted cash for the material, I used Calloway's money, with his consent. Then when the Garment Company was formed I bought One Thousand ($1,000.00) Dollars worth of stock for Calloway. The invoice for plumbing materials purchased should show on books, under merchandise. I don't know foreman's name from whom I bought it; it should show on books. Calloway's money did not go through bank—I bought goods for cash. I don't remember name of contractor, but I'll get it at recess. I'll find it in books, too.

Check dated May 30 for Seven Hundred Twelve ($712.00) Dollars was on loan from Thomas; these checks represent payment of loan and Fourteen Hundred ($1400.00) Dollars I drew out, the rest as Calloway transaction.

(Checks received and marked Pet. Ex. No. 10 in Evidence.) [290]

B.–522.

PETITIONERS' EXHIBIT No. 10.

Cancelled Checks.

No. 838. Phoenix Plumbing & Heating Co., 316 North Sixth Avenue, Phone 5065, Phoenix, Ariz.

July 30, 1928.

The Commercial National Bank, Phoenix, Arizona.

Pay to the order of Joe Thomas $712.00—Seven Hundred Twelve Dollars.

Endorsed on back: JOE THOMAS.
MAUD THOMAS.
PHOENIX PLUMBING & HEATING CO.
By D. L. FRANCIS.

No. 2383. Phoenix Plumbing & Heating Co., 316 North Sixth Avenue, Telephone 5065, Phoenix, Ariz.

4–12–1929.

The Commercial National Bank, Phoenix, Arizona.

Pay to the order of Joe Thomas $1,000.00—One Thousand no/100 Dollars.

PHOENIX PLUMBING & HEATING CO.
By D. L. FRANCIS.

Endorsed on back: JOE HOWARD.

No. 2724. Phoenix Plumbing & Heating Co., 316 North Sixth Avenue, ph*oe* 5065, Phoenix, Ariz.

5–22–1929.

The Commercial National Bank, Phoenix, Arizona.

Pay to the order of Joe Thomas $100.00—One Hundred no/100 Dollars.

PHOENIX PLUMBING & HEATING CO.
By D. L. FRANCIS.

Endorsed on back: JOE THOMAS.

No. F–103—Phoenix, Arizona, 5–16–1929.

The Commercial National Bank, Phoenix, Ariz.

Pay to the order of Joe Thomas $250.00—Two Hundred Fifty no/100 Dollars.

PHOENIX PLUMBING & HEATING CO.
D. L. FRANCIS.

PAUL E. GEHRES.

[Endorsed on back]: Arizona Garment Mfg. Co., 532 E. Washington, Phoenix, Arizona.

No. F–105—The Commercial National Bank Phoenix, Ariz.

5–24–29.

Pay to the order of Joe Thomas $50.00—Fifty no/100 Dollars.

PHOENIX PLUMBING & HEATING CO.
D. L. FRANCIS.

PAUL E. GEHRES.

[Endorsed on back]: JOE THOMAS.

(Testimony of Dee Francis.)

No. F–98—The Commercial National Bank, Phoenix, Ariz.

5–2–1929.

Pay to the order of Joe Thomas $125.00—One Hundred Twenty-five no/100 Dollars.

PHOENIX PLUMBING & HEATING CO.
D. L. FRANCIS.

PAUL E. GEHRES.

[Endorsed on back]: JOE THOMAS. [291]

Check dated March 15, 1929, to Carom & Sons for merchandise, Plumbing Company check signed by me, was for material bought for Arizona Garment Company. I paid for some machines for Garment Company; don't know if it was charged against me personally, it is in books; it should be; I don't want to say anything about it until I can look at books.

(Check introduced in evidence as Petitioners' Exhibit 11.) [292]

B.–522.

PETITIONERS' EXHIBIT No. 11.
In Evidence.

Cancelled check.

No. F -74—The Commercial National Bank, Phoenix, Ariz.

3/15/29.

Pay to the order of M. Karam & Sons Merc. Co. $1100.00—Eleven Hundred no/100 Dollars.

PHOENIX PLUMBING & HEATING CO.
D. L. FRANCIS.

PAUL E. GEHRES.

(Testimony of Dee Francis.)

[Endorsed on back]: Pay to the order of Sonora Bank & Trust Co., Nogales, Arizona. M. Karam & Sons Mercantile Co. For Deposit Only. [293]

The check for $1100.00 was for machinery I bought in Nogales for Mr. Thomas. The plumbing company owed him either $660.00 or $760.00 and I gave the check and we made a settlement on it.

Q. Then on March 15th you gave a check of the Phoenix Plumbing & Heating Company for this machinery for the Arizona Garment Company to pay an indebtedness owing by the Phoenix Plumbing & Heating Company to Thomas?

A. Partially to Joe Thomas, yes. What we owed him.

Q. Will you point out on the books the Joe Thomas account, where you owe that amount and how this payment was charged to that account; will you refer to the book and find out when that starts, —it starts with what date? A. April 26th.

Q. Of what year? A. 1929.

Q. Where are the books showing the Joe Thomas account previous to that time?

A. That is what I want to know.

Q. You were in complete charge of the business; your brother testified and you testified that previous to April 26, 1929, you were manager; what became of the books?

A. When I left the shop they were there.

Q. Will you say definitely that there was a book showing the account of Joe Thomas when you left on June 1st? A. Yes.

(Testimony of Dee Francis.)

Q. Previous to the explosion? A. Yes.

Q. Are you sure?

A. I am not sure I am living.

Q. When did you last see the book carrying the loan account of Joe Thomas previous to April 26, 1929? [294]

A. I didn't see Mr. Thomas' account.

Q. What sort of a book was it?

A. I guess it was a ledger.

Q. I don't want you to guess; you should know what it was.

A. I didn't examine it.

Q. Did you ever examine the account of Thomas on that book?

A. I left that to the bookkeeper.

Q. You gave him the charges, didn't you?

A. Yes.

Q. When did you give them?

A. Whenever they were made.

Q. When were they made? A. I don't know.

Q. When did you make these loans from Thomas?

A. I cannot say definitely; I gave you the amounts of them.

Q. State the time approximately.

* * * * * * * * * * *

Referring to this account, state what amounts were due Thomas previous to April 22, 1929?

A. When we made a payment it was put in the book; the bookkeeper attended to that.

Q. Was it evidenced by any note? A. No.

(Testimony of Dee Francis.)

Q. Referring to this book, see if there is any record of this $1100 credit to him.

(Witness examines book.)

A. I don't see any $1100.

Q. Can you point out any book among the books of the Phoenix Plumbing & Heating Company which shows this $1100 transaction?

A. I have looked for it and cannot find it.

Q. Then you cannot point out any book on which it shows? [295] A. I could not find it.

Q. This $1100 payment was not all due to Mr. Thomas at that time? A. Yes.

Q. What amount was due Mr. Thomas?

A. Either $660 or $760, I think; we owed him an account and to the best of my recollection it ran around $660 or $760; that is as close as I can remember without the books.

A draft was drawn on Thomas, I called it the check, in 1928, the latter part, on Commercial National Bank, by Gehres, at my direction, to cover deficit in pay-roll, then there was an additional amount owing him. We had made some previous payments, the books should show (reading) April 26, $24.96 payment, $180.00. I don't know when that was made to Thomas; don't know if I ordered it—I left signed checks there and bills were paid in my absence. If I were there bookkeeper consulted me about such payments. Thomas was in city when these payments were made; came in April, 1929. He came here in March and then left and came back here. We had been corresponding

(Testimony of Leo Francis.)

and planning about Garment Company for three or four months before that, Thomas and me. He wanted to start factory here. I told him I might buy stock. I was not to have an interest. I don't think Garment Company was started until April. He was here when I paid $180.00. I don't know whether $180.00 was on loans or something bought for Garment Company, or whether it was cash or check.

(Reading from Exhibit 1 for Identification, Exhibit 7 in evidence.)

Payments to Thomas, May 4, $98.52; May 8, $170.00; May 10, $50.00; May 11, $113.46; May 22, $125.00; May 22, $250.00; May 22, $100.00; May 27, $50.00. The opposite side of [296] account with Thomas, in Gehrs' handwriting, is (reading) April 22, forward, paid U. S. Gvt. 4–12–29, Insurance loan 241, cash $5.00, April 23, April 27, U. S. Gov. Ins. $275.00, May 15, U. S. Gov. Ins. loan $526.82, May 22 Ins. $40.00. Account headed "Loan Account D. Francis to Joe Thomas."

These entries from April 22 show the money I borrowed on my insurance to buy stock in Garment Company, totals $1,087.82, total of all amounts $1,136.98 paid to Joe Thomas. The account I just read must be my personal account with Joe Thomas. It does not refer to other loans to company.

I don't know what book shows. I know I borrowed money, but did not know it was in books, the bookkeeper put it in. I never saw it before. That isn't borrowed money from Joe Thomas (re-

(Testimony of Dee Francis.)

ferring to account read) it is carried as loan account of Joe Thomas, but I can't understand "From Dee Francis to Joe Thomas, through company." I was manager, but was not loaning my insurance money to Plumbing Company. I did not know that he was depositing that money to Plumbing Company until after it was done.

This account has nothing to do with money borrowed from Joe Thomas for the Plumbing Company. The payment of $712.00, shown in Petitioners' Exhibit No. 10, had nothing to do with the transaction of the checks, I think, but really don't know. The payment of $1100.00 on March 15 should have been credited on this account (Thomas account) (Petitioners' Exhibit No. 10 in evidence) on books. The money Joe Thomas got from company was in payment of money he loaned company. He did not borrow from company. He may have got ahead; my instructions were to give him money when he asked for it. This money was to go into the Arizona Garment Company and if we owed him more or less, it was to be straightened out. Some of the books that were in the shop are not here; what kind they were, I don't know—there [297] were ledger and cash books; books that were called for when auditor had them. I don't know what dates they cover; they were all there just before I left in June. There was an auditor down there then and I went down and put myself at his disposal. Fryberger and Fretz were there. Books were in Fryberger's hands when I left. The books were in

(Testimony of Dee Francis.)

company's hands in June when I was discharged. I also went to office of auditor in Luhrs Building. That was afterwards, I don't know if it was in August, but when I went there a man was working on books and he asked me something about it. But, anyway, they were all there, my p*sero*nal file and everything, when I stepped out. Some of those books are not here. I testified I believed the ledger was blown up. There was another book, a cash book in which Joe Thomas' accounts were kept, if I am not mistaken; it could be got from that. I said the cash book was there in June. The ledger was blown up. It was the only one of value blown up. I did not examine books day after explosion; I saw they were there. The police asked me to keep everyone out until they made examination. I got there first about 7:30 A. M. I was there between nine and nine-thirty night of explosion. I was there Saturday afternoon; we closed about 5:00 P. M. I am not sure I was there till office closed that Saturday afternoon. I usually did stay. Mr. Gehres' job was to lock books in safe. I don't remember whether he left first or not. He told me next day he took some books home with him. I asked him what damage had been done books and he told me only one book of any importance had been destroyed. He said he would do his best to straighten them up. I saw the cash book afternoon after explosion in the shop. It was a black or blue book similar to that one (indicating cash book) (Petitioners' Exhibit No. 6 for identifi-

(Testimony of Dee Francis.)

cation; No. 7 in evidence). It was cash book, took [298] up where these (indicating cash book) left off.

Cash book (Petitioners' Exhibit No. 6 for Identification; No. 7 in evidence) left off in May, 1928. Pet. Ex. No. 6 for Identification; No. 7 in evidence is cash book in use when I left, if it had June entries. The first entry in Exhibit No. 7, No. 6 for Identification is (reading), "April 22, day after explosion—cash on hand, cash in bank." They must have started new set of books after explosion. Though I was manager I left things like that to the bookkeeper.

MASTER.—You were asked if you gave order.

D. FRANCIS.—I don't know that I did; I know cash book was not blown up.

Q. Where is it?

A. That's what I want to know.

Q. Do you know where it is? A. No.

Q. Where did you see it last?

A. In office of Phoenix Plumbing and Heating Company.

Q. What date?

A. I don't know what date; I was discharged then, and I saw it and knew it was there, but I left then.

Q. What was purpose of starting a cash book with entry on each set "day after explosion" if that was not destroyed? [299]

Auditor had all books there and I had impression old book was there. I know all books were there when I left shop. I don't know if entries

(Testimony of Dee Francis.)

were being carried in old book; he may have started new book and laid other one side. Missing cash book contained entries from date of old one until I left. Two sets of cash books were not kept. They may have changed all books after I left. I don't know what happened after I left. I was under impression old one was being used. I saw it between April 21st and June.

The MASTER.—Q. Let me ask a question or two. Soon after the explosion, did you have any conference with the bookkeeper with reference to the books? A. Yes.

Q. In that conference with him, with reference to the books, did you say anything about what books were and were not destroyed? A. Yes, sir.

Q. Did you give any orders or directions, or did he ask for any information with reference to opening up another book to take the place of the one destroyed?

A. I asked him what books were destroyed, and he said the general ledger, the big book that wouldn't go into the safe. I said, "How are we going to proceed?" He said, "I think I can fix it all right, working at nights." I said, "Go ahead and get what you need and fix them up and when you need me, I will help you."

Q. Did he ever call you? A. No.

Q. You never examined the books he changed or commenced?

A. I may have looked them over, but I didn't go into a thorough examination. [300]

(Testimony of Dee Francis.)

Q. Was anything said between you about any book except the general ledger?

A. That was the only one he said was destroyed; that was the only one that was mentioned.

Q. And you neither of you mentioned the cash book? A. No, sir.

(Examination by Miss BIRDSALL.)

Handwriting in cash book (No. 7 in evidence, No. 6 for identification) is Paul Gehres' from April 22 up to June 5th. There is a notation under June 5th (reading), "Taken over by Fryberger at this date." All of $1100.00 to Carom was carried against Joe Thomas when we made settlement with him; it showed what we turned over to him. I can't say what was exact date of settlement with Joe Thomas; we talked it over from time to time; settled before I left. I don't know how. The way it was settled and carried should show on books, though I can't find it. I put in money and bought stock myself and he drew on that. I don't see any record in these books of loans he made to Plumbing Company. I don't know how my personal account was straightened out. I told bookkeeper about all these deals; gave him the stubs and told him to take care of it, just as I did any other check I made out while out of town. I told him $1100.00 Carom check was for machinery and to charge all of it to Joe Thomas. I don't know whether I told him to pay other amounts to Joe Thomas. I don't think I did; he knew accounts, he was bookkeeper.

(Testimony of Dee Francis.)

He should know all about it. (To Master.) I told bookkeeper all about it each time I issued checks.

I guess check for $1,000.00 on April 12 was charged to Thomas, making total of $2,100.00 he got in March and April. I don't know whether we owed him that much at that time. The Galloway money went direct to Garment Company. I [301] paid the account of Phoenix Plumbing Company for fixtures bought with money. It had nothing to do with money I borrowed from Thomas. $1100.00 Carmon check (Pet. Ex. No. 11 in evidence) had nothing to do with Calloway transaction. I bought stock for Calloway to repay $1,000.00 used to buy material. Garment Company and Joe Thomas are one and the same. I would have to consult books of Garment Company to find out all I paid for stock for self, Galloway and others. I bought $1,400.00 for myself; don't have it now, about what I had in July. When stock was issued, even if it had not been issued, I had equity of $1,-000.00 for Calloway—might have been more. $1,-000.00 I got from Calloway should show on books; got it in January or February, 1929. I did not know then when Garment Company was to be formed; that's when I got money from Calloway. I got money from Calloway to buy material I spoke of. No other transactions through Garment Company that I know of. I bought no stock for father or Lyon. I don't know if sister has any stock. I don't think Thomas loans amounted to more than $700.00 or $800.00 on January 1, 1929. I don't re-

(Testimony of Dee Francis.)

member if I borrowed more after April 20; I made none later.

Check dated May 4, 1929, to Garment Company for $98.52 was part of payment to Joe Thomas, signed by me and countersigned by Paul Gehres. The money I got from Government went to Thomas for stock. I don't know if all payments were on loan or for stock; if we owed him so much money and gave him money, it would be deducted. I said this account was money borrowed from Government, $1,087.82, and all used for stock in Garment Company. Credits on opposite page (Pet. Ex. No. 1 for Identification, No. 7 in evidence) are for anything we owed Thomas. I said this morning that this borrowed money was put to credit of Plumbing Company; it was all drawn out to buy stock in Garment Company for me. I don't know if the check for $98.52 went for stock, I guess so. The same for $180, $170, $50, $113.46, checks all for stock in [302] Garment Company. I don't know if that includes all payments on books. There are payments on books not covered by these checks.

(Check to Garment Company, Petitioners' Exhibit 12 in Evidence.) [303]

B.–522.

PETITIONERS' EXHIBIT No. 12.

In Evidence.

Cancelled checks.

No. 2645—Phoenix Plumbing & Heating Co. 316 North Sixth Avenue. Phone 5065. Phoenix, Ariz.

May 11, 1929.

Pay to the order of Arizona Garment Mfg. Co.
$113.46***113***46***DOLLARS.
PHOENIX PLUMBING AND HEATING CO.
By D. L. FRANCIS.
PAUL E. GEHRES.
THE COMMERCIAL NATIONAL BANK.
Phoenix, Arizona.

Endorsed on back: ARIZONA GARMENT MFG. CO. 532 W. Washington, Phoenix, Arizona.

No. 2611—Phoenix Plumbing & Heating Co., 316 North Sixth Avenue, Phone 5065, Phoenix, Ariz.

May 10, 1929.

Pay to the order of Arizona Garment Mfg. Co.
$50.00***50 Dol's***00cts***DOLLARS.
PHOENIX PLUMBING & HEATING CO.
By D. L. FRANCIS.
PAUL E. GEHRES.
THE COMMERCIAL NATIONAL BANK,
Phoenix, Arizona.

Endorsed on back: ARIZONA GARMENT MFG. CO.

No. 2602—Phoenix Plumbing & Heating Co., 316 North Sixth Avenue. Phone 5065. Phoenix, Ariz.

May 8, 1929.

Pay to the order of Arizona Garment Mfg. Co. $170.00***170 Dol's***00cts***DOLLARS.

PHOENIX PLUMBING & HEATING CO.
By D. L. FRANCIS.

PAUL E. GEHRES.

THE COMMERCIAL NATIONAL BANK,
Phoenix, Arizona.

Endorsed on back: ARIZONA GARMENT MFG. CO. [304]

No. 2496—Phoenix Plumbing & Heating Co., 316 North Sixth Avenue. Pho*en* 5065. Phoenix, Arizona.

4–27–1929.

Pay to the order of Arizona Garment Mfg. Co. $180.00***180 Dol's 00cts***DOLLARS.

PHOENIX PLUMBING & HEATING CO.
By D. L. FRANCIS.

PAUL E. GEHRES.

THE COMMERCIAL NATIONAL BANK,
Phoenix, Arizona.

Endorsed on back: ARIZONA GARMENT MFG. CO. JOE THOMAS.

(Testimony of Dee Francis.)

No. 2583—Phoenix Plumbing & Heating Co., 316 North Sixth Avenue. Phoen 5065. Phoenix, Ariz.

May 4, 1929.

Pay to the order of Arizona Garment Mfg. Co.
$98.52***98 DOL'S 52 CTS***DOLLARS.

PHOENIX PLUMBING & HEATING CO.
By D. L. FRANCIS.

PAUL E. GEHRES.
THE COMMERCIAL NATIONAL BANK,
Phoenix, Arizona.

Endorsed on back: ARIZONA GARMENT MFG. CO., Phoenix, Arizona. [305]

$1,087.82 is amount I received from loan. Entry of April 30 in cash book (7 in Evidence; 6 for Identification) Joe Francis $1,087.82 is check my father gave us as loan; it came back; it was on First National of Ft. Smith, Arkansas. I don't know why it was turned down. When it came back, it was charged properly on books. Money was from Father; check signed by Marie Francis. It was Mother's money. It was not made good.

(Examination by Mr. DUFFY.)

When I started the concern Mrs. Remsbottom was bookkeeper. She stayed three or four months, then I had two other girls later. Gehres started in May or June, 1928, he was recommended by President of Commercial National Bank. I told president my books were in bad shape; he recommended

(Testimony of Dee Francis.)

an auditor, Garrett, who put them in shape and then sent down Gehres. I turned books over to Gehres and four or five months later made arrangements for him to sign checks. He made financial statements as I called for them. I only called for about two, one before and one after I gave him authority to sign checks. I was sick half the time and he would have to come to my house for me to sign checks. He proposed his signing checks. He suggested idea that I sign blank checks. I would sign as high as 60, 70 or 80 just before pay day. The average of blank checks signed by me was about 300 per month from January, 1929. I never made a thorough examination of the accounts. The time on each job was turned in to Gehres by gang leader and Gehres made out checks. I appointed job foreman, had six or seven during 1929, all the time. Some of these were recommended by Gehres. In the spring my attention was called to the fact that the money I was taking in did not check with my expenditures and [306] I began checking upon him, but I found nothing wrong. I just looked at checks to see who was getting money, did not check with bank statements and cancelled checks. I did not check to see if name on check was same as person who got the money. Gehres was still there when I left. Leo and Nihell both spoke to me about checking Gehres. The check for $1,200 loaned us by Gehres was on the Phoenix National Bank. I saw it on duplicate deposit slip and on bank book. Gehres told me he was a lawyer. I was glad to have

(Testimony of Dee Francis.)

a combination of bookkeeper and lawyer. I understood he was a veteran. I did not know if he had practiced here, he agreed to work for $125 per month. I consulted him and followed his advice. I never made a thorough check of his accounts. The invoices for material were checked with goods by anyone there. Fryberger, who worked for us in 1928, checked the payment and invoices and material. After he got hurt, Gehres did it. The cancelled pay-roll checks were never checked to see who got money. Gehres paid men each pay day. Sometimes there would be checks left over and I would try to find out where men were. Gehres would take care of checks, that is why I was advised by some of my creditors to get rid of him. The pay-rolls were too big. I started to use him as my lawyer after petition was filed. I saw him only a few times after I quit the Plumbing Company. He recommended Mr. Phlegar. I never saw any of his checks.

(Examination by Miss BIRDSALL.)

Gehres did not tell me where he was going. His wife told me he had gone to California. Nihell of Standard Sanitary told me to get rid of him. He told me I had better check up on him. Gehres kept the time book. My sister was telephone operator. She did not check pay-roll or books.

Calloway was working for us, got $55.00 per week, he asked me to keep $1,000 for him. He had money there all the [307] time in an envelope with his name on it. He had $200.00 or $400.00 in the safe

(Testimony of Dee Francis.)

when I left. Ouly Gehres, Leo and myself had access to safe. Calloway told me he wanted to take stock in Garment Company in March. The company operated some time before it was incorporated. Thomas started at 532 W. Washington St., he may have got his mail at Plumbing Company. He started business by himself and later got another man in with him. Calloway said he wanted to buy stock, did not say how much. I had used his money to buy material from Westward Ho job. Calloway told me I could use his money because contractor wanted cash. I think the contractor's name was Joy.

Q. You will see on this ledger, which is Petitioners' Exhibit No. 1 for Identification, No. 7 in Evidence, various loan accounts. Do you find any loan account there which shows any loan made by Calloway?

A. When a loan is closed it is taken out of the ledger; only the live ones are kept in there.

The separate folder of such closed accounts was kept in office. It was not destroyed. Calloway account should show on loan account or notes receivable. I saw some of the folders after April 22d. I can't say it was this one. Gehres made up statements. I don't know whether it showed in them. The ones I signed I did not check. I signed a number of statements to Commercial National Bank. I took bookkeeper's word for them. I trusted him fully. Trial balances were given every thirty days, sometimes 60 days. I could tell if company was

(Testimony of Dee Francis.)

solvent from trial balances. I had general idea of business at all times. I knew how much we owed creditors, the large ones, not all the small ones. I knew about those loans I made myself. I had accounting with Plumbing Co. at first of 1929. I drew $3,250 a year and expenses. I don't know just how much I had coming January 1st, 1929. I don't know whether it was $100 or [308] $500 or $1,000. My account does not show what was owing prior to April 22, 1929, only what I drew out after that. It shows payments down to June 4th. Everything was charged against me. Expenses on trip, house rent, everything.

Q. Do you see any of your salary payments over a period of six weeks here? (Indicating.)

A. There is a $45, and there, and there; there are three $45's there; whatever I drew was placed on that book.

Q. Where does it show the amounts you paid to the Arizona Garment Company for stock, on this page? A. This was what I drew. (Indicating.)

Q. You said everything was charged against you, and that it should show.

A. I think they had separate accounts.

Q. It was made a charge against you,—if stock was being bought through money of the Phoenix Plumbing & Heating Company, bought for you personally, it would be charged against your personal account? A. It should be.

Q. If it isn't charged against you on this account, which starts April 26th—

(Testimony of Dee Francis.)

A. I don't know whether the money I turned over to the factory on the insurance was charged to me personally or not.

Q. You testified that these were payments to Joe Thomas partly on account of loan?

A. How did I testify on that?

Q. The amounts of stock are not charged against your personal account, as it appears here.

A. I would have to look through those items to see.

Q. Did you find out this noon, or have you found out, exactly how much stock you have in the Arizona Garment Company?

A. Yes, I know how much stock I have. [309]

Q. I understood you to say that you didn't know exactly how much you owned—just what amount of stock you owned in the Arizona Garment Company at the present time; have you found out absolutely what you have?

A. I have $1400 worth of stock.

Q. Have you those stock certificates with you here? A. No.

Q. Will you bring them into court? A. I can.

The MASTER.—I take it that this is on the witness' own statement; he said the books of the company would show.

A. I can ask how much Mr. Calloway has put in.

Q. It is just to verify his statement from the books. At the time you left the Phoenix Plumbing & Heating Company on June 1st, approximately of 1929 there were a number of unfinished contracts of the company going on? A. Yes.

(Testimony of Dee Francis.)

Q. Can you state generally what those contracts were?

A. You mean, name over the contracts under construction at that time?

Q. Yes; there was a contract on the Asylum job of June, 1929?

A. I believe that had been completed.

Q. Are you sure?

A. No, I am not positive, but I think so.

Q. About when was that completed?

A. It was shortly before.

Q. Was it completed on April 30th—the explosion was on April 21st, wasn't it?

A. I don't know.

Q. Was this contract on the asylum job completed on April 30th, which was a few days after the explosion?

A. I don't think it had been in April; I think it was only completed a few days before I left the shop.

Q. Had the money been received on it before you left the shop? A. The biggest part of it was.

Q. Had the job been accepted?

A. I believe so. [310]

Q. Are you sure? A. No.

Q. What was the condition on the city hall job when you left on the 1st of June?

A. It was practically completed but not yet accepted.

Q. Has it been accepted? A. I don't know.

Q. How long had that job been completed?

(Testimony of Dee Francis.)

A. It wasn't completed.

Q. It was practically completed?

A. Yes, ma'am.

Q. What was the condition of that job in April?

A. Just how do you mean?

Q. What was its condition so far as its being near completion?

A. I think they were setting the fixtures in May and June.

Q. In May or June? A. I believe so.

Q. Then it wasn't nearly completed on May 1st?

A. Well, when you get to setting fixtures,—the fixtures were all there.

Q. On what date?

A. When I left the shop the city hall job was practically completed; there was one cracked lavatory to be replaced and they were stopping leaks, etc.

Q. But it had not yet been accepted? A. No.

Q. How about the E. J. Bennitt job, was that completed on June 1st?

A. Yes, it was completed quite a while back.

Q. Was it completed in April?

A. Yes, ma'am.

Q. On the 30th of April? [311]

A. It was before then, I believe.

Q. Are you sure?

A. No, but I think it was completed probably ninety days before I left the shop.

Q. Had the money been received on it?

(Testimony of Dee Francis.)

A. Part payment; there was some payment in dispute.

Q. The job had been accepted?

A. Yes, they were using it but at first they claimed they didn't have the money, then they claimed the charges were too much, anything to keep from paying it.

Q. Don't you know whether it is completely paid for now? A. No.

Q. How about the Schwentker job; was that completed?

A. I don't believe so; I think it was roughed in and the tubs were set.

Q. When did you commence work on this job?

A. I don't know.

Q. How long approximately before you left?

A. Those adobe houses sometimes take a year to build and sometimes three or four months; we did so many of them I could not give you dates on any one job.

Q. You remember the Schwentker job?

A. Yes.

Q. You bid on it then? A. Yes.

Q. Was it anywhere near completed in April?

A. I think it was roughed in.

Q. You are not sure it was roughed in?

A. I believe it was,—that means completed until it is time to set the fixtures.

Q. That job was not completed when you left?

A. No. [312]

Q. How about the Central Heating plant job at the

high school; what was the condition of that on June 1st?

A. That was completed but not accepted on June 1st.

Q. All materials for it were on the job then?

A. Yes.

Q. What was the condition of that in April? The last of April?

A. I think all of the lines had been installed,—everything except the work around the boilers.

Q. But not completed?

A. No, it was completed in June.

Q. Had it been accepted on June 1st? A. No.

Q. Do you know whether it is accepted now?

A. No, we had some argument about the expansion joints, they accepted it and then decided they did not want that particular kind of expansion joint and wanted rods put through them, and then it didn't meet with the approval of the school board, and eventually they had to take them out and replace them.

Q. That was after you left? A. Yes.

Q. Then there has been work done there since that you know nothing about?

A. The replacement of those joints, if they have been replaced; I am not positive about that; they said they would have to take them out and replace them before it would be accepted; whether they did that or not I don't know.

Q. The Junior College job,—was that completed when you left? A. No.

Q. It wasn't completed in April then. When was it started?

(Testimony of Dee Francis.)

A. I don't know; the contract should show that.

Q. The contract was made September 5, 1928. [313]

A. Well, then work probably started twenty or thirty days after that.

Q. Do you recall the condition of that job the latter part of April?

A. I believe it was all roughed in and the urinals set; they had to be set before the plastering was put in.

Q. Were all the materials in then?

A. I believe the material was probably on the job.

Q. On April 30th or June 1st?

A. I believe in April there was quite a lot of the material on the job; the built-in features there had to be installed before the plaster was put on; the wholesale houses kicked on delivering one piece one day and one the next, and sometimes they took and stored things.

Q. But you do know the job was not completed when you left?

A. They were putting in the showers, I believe; it may have been all finished but the showers.

Q. When did you last go over the job?

A. Probably 2 weeks before I left the shop.

Q. Maybe the middle of May?

A. Probably about the 25th of May.

Q. Do you know whether it is completed yet?

A. It is completed now because I did a little work on the heating plant for Mr. Elliott in the last few days.

(Testimony of Dee Francis.)

Q. That work is being done by the bonding company? A. I don't know.

Q. Who is Mr. Elliott?

A. A heating man from El Paso; he put in the heating plant.

Q. The bid of the Phoenix Plumbing & Heating Company was on the heating, or just on the plumbing?

A. On the plumbing—that is what we got; we put in a bid on the heating and plumbing. [314]

Q. How about the library and classroom job; was that completed when you left? A. No.

Q. Is it completed now? A. I don't know.

Q. What was its condition the latter part of April?

A. I think the latter part of April that job was probably roughed in and some of the fixtures set—those that had to be set before the plastering was put in.

The Harry Tritle job was not completed June 1st. It was roughed in in April. I don't know how much money had been paid. On big jobs we get payment every month, on small jobs we wait until it is roughed in, then we drew half, balance when completed. On big jobs we would draw up to 75% before completion. We drew up to 75% of what was completed each month on all material and labor. The Yuma High School job was roughed in June 1st. In April, soil-pipe was completed and water-pipe run. The roughing material was there, fixtures were to come. The largest part is roughing in material and the labor. No job was stopped

(Testimony of Dee Francis.)

when I left the plumbing company. The Lincoln Mortgage job was completed before April 30th.

I started Sunshine Company, then bought Phoenix Plumbing & Heating Company for Leo before he came down. The money I got from Leo was to buy the Remsbottom shop, that was what I asked for it for. We talked to Mr. Remsbottom and then we opened up this Sunshine; of course I was using Leo's money but did not invest more than $50.00 until Leo came down to find out if he wanted to. I concluded the Remsbottom deal before Leo came out here. The price to Remsbottom was $3,600 for shop and then I believe I gave him bonus. I don't remember exact amount. It might be $4,270.00. My first statement to [315] Bank showed balance of $2,670, with $1,600 paid down. All payments were completed before I left Plumbing Company. We paid rent to Mr. Williams. That is Sunshine Company statement I started (Referring to Petitioners' Exhibit No. 13 in Evidence) "That was started with $2,150.00. So far as the Bank was concerned," the statement was run into Phoenix Plumbing Company without any change of books later.

(Sunshine Bank statement introduced in evidence, Pet. Ex. No. 13.)

(Phoenix Plumbing & Heating Bank book introduced in evidence, No. 14 Pet. Ex.) [316]

B–522.

PETITIONERS' EXHIBIT No. 13.

In Evidence.

Sheet No. ———

———————Name: Sunshine Plumbing.

———————Address: ———————

Old Balance	Date	Checks in Detail	Date Deposits	Date	New Balance
2,150.00	Sep 29	9.92–	Sep 26 2150.00	Sep 26	2,150.00*
2,140.08	Oct 3	13.50– 20.06–		Sep 29	2,140.08*
2,106.52	Oct 3	100.00–		Oct 3	2,106.52*
2,006.52	Oct 5	1,500.00–		Oct 3	2,006.52*
506.52	Oct 7	17.93– 10.00–		Oct 5	506.52*
478.59	Oct 8	47.30–		Oct 7	478.59*
431.29	Oct 10	4.20– 10.00–		Oct 8	431.29*
417.09	Oct 11	15.00– 10.00– 35.00–		Oct 10	417.09*

(Testimony of Dee Francis.)

be not paid annually, to become as principal, and bear the same rate of interest. This note is negotiable and payable without defalcation or discount and without any relief or benefit whatever from stay, valuation, appraisement, or homestead exemption laws.

PHOENIX PLBG. & HTG. CO.
D. FRANCIS.

Paid 2/18/29. J. R. F.
No. ——. Due ——.

Back of Exhibit:
J. R. Fleming. [318]

I sold truck to Godman in February, transaction should show on cash books. I forget the amount of purchase price. It happened in February. I gave Godman bill of sale. Godman and his partner. I think I told Leo about it. The biggest part of purchase price was paid at start. Remainder so much per week. Payments were taken out of his pay. Godman joined union and we had to raise him to $55.00 per week. I don't know for sure just how the deal was handled. Gehres was told about it at the time, it should be in books. I didn't make note on books. The total amount was approximately $275.00. I think they paid all but about $75 or $80. It was a regular truck contract. I believe I told Leo about it. I have no other property save a Dodge Sedan, 1928 model, bought new, which I have had for about 1½ years. I live in a furnished house, my wife is at Fresno with her sister. I am living off Lyon on Drumond Street, he is married, but his wife is away on a visit. I had transactions

(Testimony of Dee Francis.)

with Commercial National Bank, on loans, not Leo. I had no conversation with representatives of the bank regarding assignments on any of jobs, we were working on. I don't remember being asked for security. They did not ask me to assign contract. I don't think I had any conversation with Mr. McNichol about assigning City Hall job. I met Mr. McNichol on the street and asked for a loan of $1,000. He told me I should have to make an assignment to the Bank, but the president gave me the money without one. I did not tell McNichols that there was no assignment on the City Hall job. I said we had money coming in, but don't think I specified City Hall job. I did not tell Mr. Norris, Mr. McNichol or anyone in Bank that the three brothers owned the business. I said Leo did. I don't know what the present condition of my account with the Plumbing Company is, whether [319] they owe me or I owe them. It is the same as it was when I left. There was two weeks I did not get any pay and another my check was held up. I drew $160 when I left and gave it to father for money he loaned me.

The bonded jobs were City Hall, Schwentker, I think, not sure, Central Heating Plant, Junion College, Library job, Yuma High School, I don't think the Asylum job was bonded, that was done by general contract. The Bennett job was not bonded. The Tritle job, they wanted a bond but I insisted she pay for it, so it was dropped. I don't think bond was made, I'm not sure.

(Testimony of Dee Francis.)

The Bachowetz job was not bonded. It was roughed in when I left in June. No work had been done on it for a long time. The contract was for $3,700 and the lien for $2,600, because that was the amount of work done at time we finished. The different creditors tried to plan a way to finish job in February. I turned the lien business over to Gehres and Dains in December, 1928, after I found others were putting on liens. I did not find that there was a prior past due mortgage until afterward, sometime before I left company. I got a contract with McGinty Construction Co. to do work on hotel in Safford, only a little work was done on it. It was not abandoned to my knowledge. I know nothing of it since I left.

I have dates of my stock in Garment Company, $1,500 in all, $500 pledged to my landlord for rent of house I lived in. Thomas has rest, not pledged. I owe him $137.50. The Garment Company does not owe me anything for service. I don't know what the stock would bring on a sale. I was told by one Guy Chisum that he would not give five cents per share for stock. The company is a going concern. Mr. Thomas offered me 75 cents on the $1.00 for my stock last month. I owe $250 rent, [320] $500 doctors' bills. I pledged stock to landlord two weeks ago when I moved out. My wife will come back if I get work. The stock has paid no dividends. I sold $137.50 worth of overalls for the Garment Company and kept the money. They are holding my stock.

(Testimony of Dee Francis.)

Q. You were talking about the books of the Phoenix Plumbing & Heating Company that were kept by Mr. Gehres when you were manager there and prior to the explosion. What books were kept, what regular books of account were kept, so far as you can recall; there was a general ledger which was destroyed? A. Yes.

Q. A cash book was kept? A. Yes.

Q. And that cash book you are sure was not destroyed? A. Yes.

Q. You are positive of that? A. Yes.

Q. Was a journal kept?

A. The journal ledger? Yes, a big book with all the entries put in.

Q. The one that was destroyed?

A. Yes, a large book.

Q. Larger than any of these books here?

A. I think it was something similar to that one on top (indicating); it may have been larger; anyway it wouldn't go into the safe.

Q. What other books were kept as you recall?

A. There was a general ledger; accounts receivable; accounts payable; scrap-book.

Q. What is a scrap-book? [321]

A. All transactions that went into the shop was put down in there?

Q. Was it a bound book or loose-leaf?

A. Sometimes bound and sometimes loose-leaf.

Q. Were they yellow sheets that were put in there? A. No, it was a book.

(Testimony of Dee Francis.)

Q. Is that here at the present time,—do you see it? A. No.

Q. Was that destroyed in the fire? A. No.

Q. When did you last see it?

A. There were a dozen of them probably; they were there in the office; when one was through we put it away.

Q. It was a record of transactions that came in?

A. Yes.

Q. That record of transactions that came in was not a debit and credit entry? A. No.

Q. It was just a record? A. Yes.

Q. What other books?

A. Probably the same as you see there (indicating).

Q. Those are the books then, aren't they?

A. No. Some books are there—the old cash-book isn't there.

Q. Those are the original books outside of the cash book, are they not? A. At that time.

Q. At the time you left?

A. They were there and there were others.

Q. We have told about the cash book and besides this entry of transactions you have told about?

A. I have never looked at those books to see the dates on them; [322] as far as books are concerned they all look alike.

Q. Didn't you examine them?

A. I didn't examine the dates; what I had reference to was the books prior to the explosion.

(Testimony of Dee Francis.)

Q. Would you say that any of these books were not there prior to the explosion?

A. The time book there was there.

Q. Look at the accounts receivable book and contracts receivable book; see if they were there before the explosion.

A. Those books there may be the ones that were there.

Q. Will you look and see.

A. I can't tell by the cover.

Q. What book is that?

(Witness examines Petitioners' Exhibit No. 2 for Identification, No. 7 in Evidence.)

Is that the book that was there prior to the explosion? I call your attention to the entry at the top of the book; what year is that? A. 1928.

Q. Would you say that that was the book that was there prior to the explosion?

A. I believe so.

Q. Referring to Petitioners' Exhibit No. 5 for Identification, No. 7 in Evidence, what book is that?

(Witness examines book.)

A. That is the cash book.

Q. When does that start? A. October, 1927.

Q. To what date does it extend? [323]

A. To May 24, 1928.

Q. Was that a book that was there prior to the explosion? A. Yes.

Q. Referring to Petitioners' Exhibit No. 3 for Identification, No. 7 in Evidence; what book is that?

(Testimony of Dee Francis.)

A. That is contracts receivable. (Examining books.)

Q. Can you say whether that is a book that was there prior to the explosion? A. Yes.

Q. Some of those entries go back to 1928, don't they? A. Yes. [324]

Q. Referring to Petitioners' Exhibit No. 1 for Identification, No. 7 in evidence; what is that book?

A. From its looks it is the accounts receivable book.

Q. The accounts payable, isn't it?

A. Where is the "payable"?

Q. Isn't that a general ledger started to take the place of the ledger that was destroyed, as near as you can ascertain?

A. Yes, a ledger and starts from April (examining book).

Q. Whose handwriting is that?

A. Mr. Gehres'.

Q. Do you find entries starting April 22, 1929, marked "forward"? A. Yes.

Q. Then to the best of your knowledge that was a book started by Mr. Gehres to take the place of the book destroyed in the explosion?

A. I believe this book was there,—but I guess from what you say,—yes, ma'am.

Q. The entries were continued down until the time you left as near as you can see from examination? A. Yes.

Q. Referring to Petitioners' Exhibit 6 for Identification, No. 7 in Evidence; what book is that?

(Testimony of Dee Francis.)

A. That is the cash book. (Examining book.)

Q. When does it start?

A. It starts April 22, 1929.

Q. The first entry reads—

A. "Day after explosion."

Q. Is that the book that continued from April 22, until you left? A. I believe so.

Q. Then that is the book started after the explosion? [325] A. Yes.

Q. What is this book, referring to Petitioners' Exhibit No. 9 for Identification, No. 7 in Evidence.

A. "Contracts and Extras."

Q. Is that a book that was there previous to the explosion? A. I believe so.

Q. Referring to Petitioners' Exhibit No. 4 for Identification, No. 7 in Evidence; what book is that?

A. That is the time book.

Q. What date does it start?

A. July 21, 1928.

Q. And continues to what time?

A. August 10th or 12th.

Q. 1929? A. Yes.

Q. That was a book that was there before the explosion? A. Yes.

Q. Outside of the cash book that you say is not here and the record books of transactions that you testified to, are there any other books that were there prior to the explosion that are not here; general books of account I mean?

A. I cannot see any; no.

Q. At the time of the explosion you said Mr.

(Testimony of Dee Francis.)

Gehres had some books at his house; do you know what books they were? A. No.

Q. Do you know of your own knowledge that he had any books at the house? A. He told me.

Q. When did he tell you? A. The next day.

Q. Did you see him bring the books back the next day?

A. I think when I saw him he had some books on the table.

Q. You didn't see him bring them in?

A. No.

Q. Do you know of any records or pages that were destroyed from any of these books? [326]

A. No.

Q. You stated that pages were taken out when an account was balanced; were those pages destroyed? A. No; they were filed.

Q. Did Mr. Gehres ever say anything to you about his taking any pages out of any of the books and destroying them? A. No.

Q. If he did any such thing you knew nothing about it? A. No.

Q. Have you ever at any time since September of 1927 put any money of your own or money you have borrowed for this, into the Phoenix Plumbing & Heating Company?

A. Not that I can remember.

Leo told me when I left Arkansas if I saw a good proposition to let him know. Leo had worked in my shop before that. I had been in the business, Lyon came with Leo. I told Leo I would go in

(Testimony of Dee Francis.)

with him and run business. I talked with Merchant Police, the head of it, after explosion. I never saw the fuse before, the board looked to me like a plunger known as "plumbers friend." I never found anything in nature of dynamite. When the police got there they asked me my opinion of the explosion. I said it was not robbery, safe was intact. I examined safe from distance and when I went close to it, police told me not to touch it. They would not let us touch anything the first night, trying to get finger-prints. No money or anything was taken, everything was there unless there was a good-sized payment came in Saturday or night before. Just door blown off safe. I don't know what Gehres was doing on that Sunday.

I could not say exactly what was owing to Standard Sanitary on May 1st. They were after me pretty steady for money in May. They never put me on cash basis. I volunteered to pay weekly to reduce account. Sometimes I made payments [327] weekly, sometimes not.

Q. Wasn't there three weeks in there that the Standard Company was paid in cash, on a weekly basis?

A. There might have been. I can explain that. They were insisting on their account being past due, and I said I would pay them every week or every time I got a little money in, I would pay them as fast as I could get it in; I said I would pay, if possible, for the material I was buying at the time;

(Testimony of Dee Francis.)

I spoke to Mr. Nihell about it and he said that would be all right.

Q. Then you did pay that way for three weeks?

A. I cannot say positively. I know this, that some weeks we did, but as to how many weeks I don't know; it might have been two or three or four.

Q. Did it start in April? A. No.

Q. Are you sure?

A. I am pretty positive, although I wouldn't swear.

Q. Whatever the date does show that to be from the books, it was done because they were insisting upon payments being made on their account?

A. Yes.

Q. Did you afterwards cease making payments that way?

A. Well, we paid them when we got the money; as far as ceasing—

Q. I meant on that particular basis? That weekly cash basis?

Q. I mean on the basis you have just testified to?

A. I paid them when I got the money.

A. As I understand it, when I told them I would buy this material and try to pay them weekly for the material I had bought, you understand,—I paid them then, or tried to pay them for what I bought and also on my account, but they didn't restrict me to a weekly basis. The arrangement as [328] far as I understood it between me and the Standard—they didn't say "You must pay every week. I said

(Testimony of Dee Francis.)

I would try to pay every week for the material as I bought it and as much as I could on my big account; I continued paying just as I got money in; does that make my position clear?

The MASTER.—You continued your management of the business in that way?

A. Yes.

The MASTER.—Did you continue up to the time you ceased as manager to make weekly payments?

A. Sometimes I made it before weekly; I paid them money when I got it; it didn't necessarily have to be every week. I told them I would try to pay for the material I bought, every week; they said all right but they didn't insist on the payments; I overpaid them or underpaid them, but business went on and I was giving them money as I got it.

(Examination by Mr. DUFFY.)

Respondents' Exhibit "C" for Identification was signed by me and delivered to Standard Sanitary on March 5th.

(Respondents' Exhibit "C" in Evidence.)

I was borrowing from Bank all the time. [329]

(Testimony of Dee Francis.)

B.–522.

RESPONDENTS' EXHIBIT "C."

In Evidence.

Letter Head.

PHOENIX PLUMBING & HEATING COMPANY.

316 North Sixth Avenue,
Phoenix, Arizona.

March 5th, 1929.

Standard Sanitary Mfg. Co.,
447 East Jefferson St.,
Phoenix, Arizona.

Gentlemen:

You are by this instrument authorized to draw on Lincoln Mortgage Co., of this city in the amount of Fourteen Thousand One Hundred Ninety Six Dollars Seventy Seven Cents, ($14,196.77).

Which sum represents money due this firm for work and materials furnished in the construction of various houses and store buildings owned by the aforesaid Lincoln Mortgage Co.,

This assignment effective this date.

PHOENIX PLUMBING & HEATING CO.,
By D. FRANCIS.

Respondents' Exhibit "C" for Identification. [330]

(Examination by Mr. PHLEGAR.)

I told Crane Co. and Standard Sanitary of my business in Ft. Smith and how I turned it over to Crane Co., that Phoenix Plumbing & Heating Co.

(Testimony of Dee Francis.)

was Leo's shop and they extended credit. I never told them Lyon or myself had any interest in it. This is receipt I took from Remsbottom.

(Alleged Bankrupts' Exhibit No. 2 in Evidence.)

The Alleged Bankrupts' Exhibit No. 1 in Evidence which had been heretofore identified was admitted in evidence by the Special Master. [331]

B.–522.

ALLEGED BANKRUPTS' EXHIBIT No. 1.
In Evidence.
Filed 11–21–29.

POWER OF ATTORNEY.

KNOW ALL MEN BY THESE PRESENTS: That I, Leo Francis of Calhoun, in the County of LeFlore and State of Oklahoma, have made, constituted and appointed, and by there presents do make, constitute and appoint Dee Francis of Phoenix, Arizona, my true and lawful attorney, for me and in my name, place and stead, and to my use, to conduct my plumbing business now located at 316 North 6th Avenue, Phoenix, Arizona, to buy new stock, contract and carry on the business the same as if I was present and acting in my own person, giving my said attorney full power to everything whatsoever, requisite and necessary to be done in the conduct of said business as fully as I could do if present and acting in my own proper person.

Hereby ratifying and confirming all that my said attorney shall lawfully do or cause to be done by virtue hereof.

In witness whereof I have hereto set my hand and seal this the 9th day of April, 1928.

LEO FRANCIS.

ACKNOWLEDGMENT.

State of Oklahoma,
County of LeFlore,—ss.

Before me, a Notary Public, in and for said County and State on this the 9th day of April, 1928, personally appeared Lee Francis to me known to be the identical person who executed the within and foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and seal this the 9th day of April, 1928.

_____,
Notary Public.

My Commission expires 2/16, 1932. [332]

B.–522.

ALLEGED BANKRUPTS' EXHIBIT No. 2.
In Evidence.
11–27–29.

Phoenix, Arizona.
October 5, 1927.

This is to certify that I have this date received from Dee Francis the sum of $1,600.00 the same to apply on payment of Plumbing Business, stock in trade, fixtures, equipment and good will of said plumbing business located at 316 North Sixth Avenue, Phoenix, Arizona. Said sale to be made in accordance with an agreement which I have this date

signed in which agreement Leo Francis agrees to purchase said plumbing business and fixtures aforesaid.

WM. REMSBOTTOM. [333]

This bill of sale Leo received later from Remsbottom.

(Alleged Bankrupts' Exhibit No. 3 in Evidence.) [334]

B.–522.

ALLEGED BANKRUPTS' EXHIBIT No. 3.

In Evidence.

11–27–29.

BILL OF SALE.

KNOW ALL MEN BY THESE PRESENTS: That Wm. Remsbottom, the party of the first part, for and in consideration of the sum of Ten Dollars and other valuable consideration *Dollars,* lawful money of the United States of America, to him in hand paid by Leo Francis, the party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell and convey unto the said party of the second part, and his heirs, executors, administrators and assigns

> the plumbing business, stock in trade, fixtures and equipment used in said plumbing business, together with the good will of said plumbing business; said plumbing business, stock in trade, fixtures and equipment being located at 316 North Sixth Avenue, Phoenix, Arizona;

TO HAVE AND TO HOLD the same to the said party of the second part, his heirs, executors, administrators and assigns forever; and the said

party of the first part does for his heirs, executors, administrators and assigns, covenant and agree to and with the said party of the second part, his heirs, executors, administrators and assigns, to warrant and defend the sale of the said property, goods and chattels hereby made unto the said party of the second part, his heirs, executors, administrators and assigns, against all and every person or persons whomsoever lawfully claiming or to claim the same.

IN WITNESS WHEREOF I have hereunto set my hand the 14th day of October, A. D. 1927.

WM. REMSBOTTOM. [335]

B.–522.

ALLEGED BANKRUPTS' EXHIBIT No. 1.
In Evidence.
11–21–29.

Reverse of Exhibit:

State of Arizona,
County of Maricopa,—ss.

Before me, ————, a Notary Public in and for the county of Maricopa, state of Arizona, on this day personally appeared Wm. Remsbottom, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purpose and consideration therein expressed.

Given under my hand and seal of office this 14th day of October, A. D. 1927.

(Seal) D. E. WILSON,
Notary Public.

My commission expires Feb. 26, 1930.

State of Arizona,
County of Maricopa,—ss.

I (or we) hereby declare on oath that the within named Wm. Remsbottom, party of the first part, is (or are) the sole owner of the chattels set out in the within and foregoing bill of sale, and that said chattels are clear, free and unincumbered.

Witness my hand this 14th day of October, A. D. 1927.

(Seal) WM. REMSBOTTOM.

Subscribed and sworn to before me this 14th day of October, A. D. 1927.

My commission expires Feb. 6, 1930.

D. E. WILSON,
Notary Public. [336]

B.–522—Page 2.

ALLEGED BANKRUPTS' EXHIBIT No. 1.
In Evidence.
REVERSE OF EXHIBIT.
No. ———.
BILL OF SALE.
Short Form.

———————————

From

———————————

To

Dated ———————————, 192—.

Report of Special Master. Filed Feb. 18, 1930. C. R. McFall, Clark. United States District Court.

(Testimony of Dee Francis.)

For the District of Arizona. H. F. Schlittler, Deputy Clark. [337]

I own no interest in Plumbing Co. when I employed Gehres I left to him all preparation of papers for the company. I signed all mechanics liens just as he prepared them. I had no legal experience, no knowledge of bookkeeping. I left all that to him. Gehres prepared affidavit of partnership and told me it was necessary to get out something in the Bachowetz case. I found out later that it was an affidavit of partnership and I instructed Gehres to change it and he went to Dains to help him. I told him that Leo was sole owner. I never told Gehres at any time that there was a partnership. He told me that he changed affidavit. I told him to fix it in the record. Mr. Dains told me affidavit showing Leo was owner had been filed.

The contract for the High School job was presented to me by a Mr. Rudd of the Standard Insurance Agency or by the architect, and I explained about the partnership to them.

Mr. PHLEGAR.—At this time the alleged bankrupts, D. L. Francis and Lyon Francis, make formal demand upon petitioning creditors the Receiver and the officials of the Commercial National Bank, their agents and employees, to produce in court the cash book kept by the Phoenix Plumbing & Heating Company prior to the 21st day of April, 1929.

Miss BIRDSALL.—On behalf of the petitioning creditors, I wish to state that the Receiver has produced in court all of the records that were identified here, except the burned and cut back of a book in

which are pasted the remains of some cancelled checks of the Phoenix Plumbing & Heating Company; so far as petitioning creditors are concerned, that is the only remnant of the so-called cash book that has been seen by them.

Mr. PHLEGAR.—[338] Do you avow that this is the cash book?

Miss BIRDSALL.—I avow that so far as petitioning creditors can determine the book shows that cancelled checks were placed in there in the same manner as in the cash book which has been identified; further than that we can avow nothing.

Mr. PHLEGAR.—An examination of the exhibit discloses nothing which would identify it as being the cash book testified to by the witness, D. L. Francis, and therefore the exhibit does not meet the demand which we have made and which we still insist upon.

The MASTER.—Did you note the method of keeping the checks in the present cash book?

Miss BIRDSALL.—So far as petitioning creditors are concerned, no books have come into their possession, through the Receiver or otherwise, except as indicated, so far as a cash book is concerned. I offer this in evidence, in response to the demand of attorney for the alleged bankrupts, D. L. and Lyon Francis.

Mr. PHLEGAR.—If that is the purpose for which it is being offered,—it is not the book called for; there is nothing about it to identify it as being cash book about which we inquired.

Miss BIRDSALL.—It is the only thing we have which even remotely resembles a cash book.

(Testimony of Dee Francis.)

The MASTER.—It may be received in evidence for whatever it may be worth. It is received and marked Petitioners' Exhibit No. 16 in evidence.

(Petitioners' Exhibit No. 16 not being capable of being copied is transmitted in original by order of Court.) [339]

D. L. FRANCIS—Continued testimony.

When the contract for High School was presented to me for signature, I told them that Leo owned business and he said the contract is made out to three of you, it is only a matter of form, go ahead and sign it. So, too, the bond was made out the same way. I told one Mr. Mitchell, representative of Momsen-Dunnegan-Ryan that Leo was going to own business, that was when he helped me make inventory of the Remsbottom business.

(Examination by Miss BIRDSALL.)

Mitchell was asked by Remsbottom to act as his representative in the inventory. At that time I had not started dealing with anyone. It was a long time before partnership affidavit was put on record. I don't think I ever had any conversation with Mitchell after that affidavit was made that we were partners.

I did not give notice to other creditors of the assignment of the Lincoln Mortgage Company to Standard Sanitary on March 5th. There was never any division of profits in the Phoenix Plumbing & Heating Company. I gave Bank statement whenever they asked for them. This piece of a book (Petitioners' Exhibit No. 16 in Evidence) looks

(Testimony of Lyon Francis.)

like the others. I don't know what the custom was in keeping cancelled checks.

TESTIMONY OF LYON FRANCIS, FOR PETITIONING CREDITORS.

(Examination by Miss BIRDSALL.)

LYON FRANCIS testified. I am Lyon Francis; 27 years old; a plumber. I lived in Poteau, Oklahoma, ten years before coming to Phoenix. I worked as a journeyman plumber for Oklahoma Plumbing Co., owned by Haymaker. I left there six months before I came to Phoenix. I worked all over the state and worked for Dee last at Fort Smith, about three months. I quit him about a month before he went out of business there in May or June, 1927, and went to Paris, Arkansas. I came to Phoenix in October, 1927. I had no talk with anyone about coming here, I came to look for work, never had been here before. I knew nothing about business being purchased from Remsbottom, did not put any money in business. I gave my money to my father. He let Leo have $496, [340] told me about it, I gave it to my father in August, 1927. I have never been paid back that amount. I went to work for Phoenix Plumbing & Heating Co. ten days after I got there. I am now working for Horrall Plumbing Company. I live on Diamond Street. I have no real estate, furniture, car, stock in Arizona Garment Company, or property of any kind and no bank account or money. I drew wages from company, first $25 per week, and house rent, later $40 a week and no house rent, and then $55 per

(Testimony of Lyon Francis.)

week, $1.25 per hour. On out of town work I would get expenses. Leo never said he would divide profits. I gave my father money in cash and did not know it was turned over to Leo. I was working for wages under Dee in Arkansas. I was at Plumbing Company the next morning after explosion. I had left there Saturday noon before. I never had anything to do with books of company. I saw nothing that would throw light on explosion. I did not see candle. I was in office an hour that morning. I did not examine the safe or anything or talk to Leo or D. L. or with police about explosion. The place was all torn up. I looked through door, they would not let anybody in, so I went to work. Gehres was not there.

TESTIMONY OF FLOYD M. STAHL, FOR PETITIONING CREDITORS.

FLOYD M. STAHL testified.

(Examination by Miss BIRDSALL.)

I am a lawyer. I was present at a conversation held in Mr. Norris' room at Adams Hotel, the latter part of July, at which Leo Francis, Mr. Norris, Mr. Lane and Mr. Fretz were present and Leo Francis said at that time that the Phoenix Plumbing & Heating Co. was a partnership run by the three brothers on a profit sharing basis. He said he signed a good many papers as they were presented to him, but seldom read them.

(Examination by Mr. SCHUPP.)

To the best of my recollection Leo denied that it

(Testimony of Thomas W. Nealon.)

was his business alone. He said it was the business of all of them. [341]

TESTIMONY OF THOMAS W. NEALON, FOR PETITIONING CREDITORS.

Direct Examination by Miss BIRDSALL.

My name is Thomas W. Nealon. I am an attorney at law, and have been engaged in the practice of law in Maricopa County almost 15 years. I was Referee in Bankruptcy for six years.

I was consulted by Leo Francis with regard to the affairs of the Phoenix Plumbing and Heating Company shortly before the bankruptcy proceedings were filed, but cannot advise the date. It could not have been more than a week or ten days before the filing of the petition. A portion of the consultation took place in my office, and a portion of it was at the office of the Phoenix Plumbing and Heating Company. Going back a little I had been out of town and when I came back I found a message to call up Mr. Laney who informed me that he had been consulted in this particular matter and had referred the parties to me. A day or two after that I was called on by Mr. Stahl and Mr. Fretz, Mr. Fretz purporting to represent the Phoenix Plumbing and Heating Company, and they consulted with me in regard to the filing of a voluntary petition in bankruptcy. During the consultation that took place there Mr. Fretz sent a telephone message asking Leo Francis to come to my office which he did.

(Testimony of Thomas W. Nealon.)

Q. Did any conversation take place between you and Leo Francis at that interview at your office concerning the capital that was contributed to the Phoenix Plumbing and Heating [342] Company?

A. The consultation that took place between us there at the office, or at the Phoenix Plumbing and Heating Company was as attorney and client; I took it as a privileged communication.

Q. On the stand the other day Leo Francis and his attorney waived all privilege in that and stated that they were willing for anyone to testify; that any of these witnesses might testify.

I don't think any conversation as to the amount of capital contributed by anyone to the Phoenix Plumbing and Heating Company was discussed in my office, at least by Leo. It was discussed at the meeting that took place at the office of the Phoenix Plumbing and Heating Company. Lyon Francis was present during a part of the interview, but I don't believe he was in hearing distance at the time the conversation between Leo and myself took place. I would like to state what transpired immediately preceding this and led up to it. It was suggested by Mr. Fretz in the presence of Leo in my office that I would go down and see the books of the Phoenix Plumbing and Heating Company before I gave an opinion in the matter, and after some demurring on my part I consented to go down there and down there I met Leo Francis. Mr. Fretz took me down in his car; I also met some other parties in there. Now at

(Testimony of Thomas W. Nealon.)

the time that particular conversation took place in regard to the contribution of capital Mr. Fretz was present, but he was looking up some books to show me, and I doubt if he heard our conversation, in fact I doubt if anyone heard the conversation except Leo and myself. I asked Leo Francis what sum he contributed to the capital of the Phoenix Plumbing and Heating Company and he made the statement that he had contributed $800.00. I asked him what sum had been contributed by Lyon and he said $200.00; then I asked [343] him what sum had been contributed by Dee L. and he said he could not tell me the amount that had been contributed by Dee L. As far as I can recall now, that was all the conversation that took place with me upon that subject. I mean the subject of the contribution of capital. I was referred by Leo Francis and Mr. Fretz, who was acting apparently with the authority of Leo Francis, in his presence, to Mr. Gehres, for further information; I asked them to have Mr. Gehres come to my office. I received a message over the telephone from my stenographer that if I wanted to see him I could go to his office. At that time I had the cash book of the Phoenix Plumbing and Heating Company before me and was examining particular entries to which my attention had been called. The book I examined was exactly like this (referring to Petitioners' Exhibit No. 5 for identification and No. 7 in Evidence which was shown to witness). I am trying to recall certain entries I examined. One was with reference to a payment apparently

(Testimony of Thomas W. Nealon.)

to the Arizona Garment Association or some firm name like that. Examining Petitioners' Exhibit No. 6 for Identification and No. 7 in Evidence which you hand me, this was the book to which my attention was particularly called and which I examined at that time. There were particular entries in this book which were called to my attention by Mr. Fretz, but I cannot give you very much detail of it. This had reference to the payment of the Arizona Garment Association as I recall it. The name was mentioned in connection with it. Here is one of the entries on May 10th:

> "Arizona Garment Mfg Company $50.00; on May 8th, $170.00."

There was some larger amounts that were called to my attention. Here is one of the 31st of $113.-46; there were a number of those entries that were called to my attention—perhaps some to other parties. They were called to my attention as bearing [344] possibly upon the question of whether or not to file a voluntary petition for the parties. I don't know that the parties were specifically mentioned other than Leo Francis and the Phoenix Plumbing and Heating Company, and Lyon Francis was introduced to me while I was making the examination. In order to determine the question of the filing of a voluntary petition it was necessary for me to determine who was the owner of the Phoenix Plumbing and Heating Company and I made an examination of the books and of Leo Francis for that purpose.

(Testimony of Thomas W. Nealon.)

My attention had been called to the fact that the certificate of partnership had been filed in the County Recorder's office and an explanation had been made to me in regard thereto. I felt that in order to properly advise, not only in what names the petition should be filed, if any should be filed, but as to the amounts of fees and costs that should be paid, I would have to get further information on the particular subject of whether a partnership existed within the meaning of the bankruptcy law. I do not recall that I examined Book No. 5 at all, as to the inception of the Phoenix Plumbing and Heating Company in 1927. I inquired as to the amount of capital subscribed by each of the alleged parties. I did not ask any questions as to the total amount of capital that had been contributed at the time of the purchase of the Remsbottom business. I had only one purpose in mind and that was the question of who were the parties who should be included in the petition if I was to file it. I determined that matter to my own satisfaction. I based the conclusion that I reached upon the statements made to me by Leo Francis, the examination of the records as produced there that I did examine, and upon the statements made to me in my office either by Leo or by Mr. Fretz and by Mr. Stahl in the presence of either Mr. Fretz or Leo Francis, including the statements in regard to the certificate of partnership [345] having been recorded and the circumstances and purposes for which it was recorded. The principal questions that I directed to Leo Francis at that

(Testimony of Thomas W. Nealon.)

time were to ascertain what capital was contributed to the firm, if it was a firm, by those who were named in the co-partnership certificate as members of the partnership. The questions were confined to that purpose; a further statement was made to me in regard to the father of those boys. I communicated my conclusions and determination of the way the petition would have to be filed to Leo Francis. I told him I thought the proper procedure would be to file a voluntary petition on behalf of himself, and of Lyon Francis as members of the firm of the Phoenix Plumbing and Heating Company, and the Phoenix Plumbing and Heating Company, as a firm, all in one, and taking the proper action so that D. L. Francis' rights and obligations might be determined and his interest as a partner determined.

(Examination by Mr. PHLEGAR.)

It was called to my attention by Leo Francis that D. L. Francis was no longer working with him and I think the date was given to me, or at least the approximate date on which he ceased to have any active connection with the management of the business.

I will state the facts in regard to the question of a partnership affidavit. I don't think anything was said between Leo and myself. Something was said by Mr. Fretz and possibly by Mr. Stahl and in Mr. Fretz's presence. The statement was first made to me as to the certificate of partnership that had been filed. I think that is the term they

(Testimony of Thomas W. Nealon.)

applied to it. And then the statement was made in regard to the case that was pending, the name of the counsel who had advised the filing of the certificate was given to me, and then the subsequent action of the filing of the affidavit by Leo Francis was mentioned by [346] either one or the other of those two. Then subsequently that matter was mentioned to me by Mr. Gehres. I want to correct what was perhaps a false impression; when he (Gehres) said he would not come to my office, I waived all questions and went to his office. I don't know whether anything was mentioned further than that the certificate of partnership was filed. I did not examine the instrument itself. It was stated to me that the purpose of filing was because a lien had been filed against a property in the name of the partnership, and counsel in the case had advised that a certificate would have to be filed before the suit could proceed further; something to that effect. I was informed that subsequent to the filing of that certificate an affidavit had been made by Leo that he was the sole owner of the business.

(Examination by Miss BIRDSALL.)

I did not ever see any such affidavit.

(Examination by Mr. SCHUPP.)

I am sure that I did not misunderstand Leo's statement to me when I went down to the Phoenix Plumbing and Heating Company that he had contributed $800.00, and I am sure that he did not say $1800.00. I had that particularly in mind as I was struck with the small amount by each of these two men. [347]

TESTIMONY OF C. B. FRYBERGER, FOR PETITIONING CREDITORS.

(Examination by Miss BIRDSALL.)

I was employed by Phoenix Plumbing & Heating Company during June and July, 1929, as manager, and September to December, 1928, as estimator. I have been in plumbing and heating business for past thirty years in Denver, Colorado. I quit Phoenix Plumbing and Heating Company July 31 or August 1, 1929. I had charge of books (referring to Petitioners' Exhibit 6 for Identification, 7 in Evidence); this is cash book used while I was there. I never had occasion to look at that book indicating (Petitioners' Exhibit 5 for Identification, 7 in Evidence) which closed in May, 1928. Petitioners' Exhibit 6 for Identification, 7 in Evidence, is the only book I had anything to do with. It was being used when I was there. I never saw any other cash book immediately preceding Petitioners' Exhibit 6 for Identification, 7 in Evidence. I was not present at any conference between D. Francis and Fretz. I saw no other cash book. I had some general conversation about destruction of books in explosion. Gehres left about five days after I took charge and turned books over to Fretz. I don't remember books being taken over to Bank, just some files. Fretz took them if any went, and brought them back. Petitioners' Exhibit for Identification No. 11, a form of contract I have seen. Nothing was said to me about my being assignee for benefit of creditors. About July 11, 1929, I saw

(Testimony of C. B. Fryberger.)

it in Townsend's office and said I would not consider it. I told Leo Francis I would not consider it.

I received letter (Petitioners' Exhibit No. 17 in Evidence). [348]

B.–522.

PETITIONERS' EXHIBIT No. 17.

In Evidence.

11–29–29.

Letter Head.

BRUNSWICK–KROESCHELL COMPANY,
4221 Diversey Ave.
Chicago, Ill.

July 5, 1929.

Phoenix Plumbing & Heating Company,
316 North Sixth Avenue,
Phoenix, Arizona.

Gentlemen:

SUBJECT: OIL BURNING EQUIPMENT CO. ASSIGNMENT (FILE #D–10).

We received a wire from you on June 21st and have been waiting for the letter which you said would follow. We have not received such a letter from you, and inasmuch as you have not forwarded us your remittance for $985.00 which represents the amount owing the Oil Burning Equipment Company and which was assigned to us, we feel that we should take some legal steps toward the collection. This amount is due us and we expect you to pay it to us at an early date.

(Testimony of C. B. Fryberger.)

If you have not already done so, kindly wire us in reference to the amount due. Your prompt attention will be appreciated.

Yours very truly,
BRUNSWICK-KROESCHELL COMPANY,
By WALTER G. COBB.
Chief Accountant Kroeschell Plant.
WGC: LW. [349]

Petitioners' Exhibit No. 13 for Identification is a balance sheet of the company as of July 20th and has the figures as I remember them. I was not present when figures were finally arrived at. I furnished figure for "estimated labor to complete contracts." I just took the different contracts, ascertained the amount of labor performed and estimated labor to complete them. Nihell of Standard Sanitary furnished figures for material. Asylum contract was completed after I got there, when I left City Hall was practically complete, but not accepted. E. J. Bennett job was completed when I went there in June. Schwentker job was not completed when I left. Central Heating job was not complete. Junior College was accepted when I got there. Library and class-room job was not finished when I left. Tritle job was completed after I got there in July, latter part. Yuma High was not completed. The Bachawetz job was tied up in litigation over a year before I went there. I did not consider it a live asset of Plumbing Company. It has no market value. There was $14,000 paid by Lincoln Mortgage Company to Phoenix

(Testimony of C. B. Fryberger.)

Plumbing & Heating Company shortly after I went there, $1300.00 of it was paid Standard Sanitary and $1,000 held for Phoenix Plumbing & Heating Company pay-roll. I did not make up or submit any statement for purpose of credit after I went in there. We showed the contracts on statements, the amount that had been paid on them and the balance due, that was the only way they could be taken as asset. In my own experience of thirty years unfinished contracts were held as liabilities until finished. That is custom of plumbing business.

Mr. Nihel, Mr. Gehres and Leo Francis asked me to go in as manager under a contract of $250 per month salary and a third interest if company was solvent at end of 15 months. I examined books and statements of bookkeeper and creditor. I [350] estimated stock at $4,500. Outside accounts receivable and contracts receivable and stock, the only other assets were second-hand trucks and office fixtures, all worth $500.00.

(Examination by F. J. DUFFY.)

I was there all the time. The concern had fourteen unfinished contracts with various amounts of money coming in, and various amounts of work to be done. I was trying to finish these and get new business. Part of my time was taken up by different creditors. I was at one or two conferences at the Bank. Nihell, Korrick, Mr. McNichols, Fretz, Gehres and one other director of the Bank was there. Conference was latter part of July. I believe that Mr. Norris of the Commercial Bank said,

(Testimony of C. B. Fryberger.)

we have examined your company's books and are satisfied it is a going concern and can pull out and we are willing to wait a while and give Mr. Fryberger a chance to pull out. The auditor did not make a complete audit. His report went to Commercial National Bank.

The Asylum job material had been purchased but the radiation had not been installed. The Lincoln Mortgage Company amount, $14,000.00 was paid by check to Phoenix Plumbing & Heating Company.

Q. And the check was endorsed over by the Plumbing Company to the Standard Sanitary?

A. No, sir. I went to the Citizens Bank and had two cashier's checks made, one for $13,000 and one for $1,000.

Q. Taken to the bank by yourself? A. Yes.

Q. And you took in place thereof a check for $13,000 to the Standard Sanitary Company and a check for $1,000 to the Phoenix Plumbing & Heating Company? A. Yes. [351]

Q. So that that $13,000 never went through the books of the Phoenix Plumbing & Heating Company? A. It had to go through the books.

Q. You took the check?

A. It went through the books.

Q. Then your books showed a credit of $1,000 you received?

A. We had to show it to the credit of the Lincoln Mortgage Company to settle their account.

Q. But the money was not actually deposited to

(Testimony of C. B. Fryberger.)

the credit of the Phoenix Plumbing & Heating Company.

Miss BIRDSALL.—We object to that question. It is a credit to the Phoenix Plumbing & Heating Company just the same.

Q. It was a fact, was it not, that the reason it was handled that way was because that account had been assigned to the Standard Sanitary Manufacturing Company for some time before?

A. That was my understanding of it.

It was because of that assignment we were receiving material from the Standard Sanitary. The contracts were listed as assets only to the amount of money coming on them. They were not assets, some we lost money on. There wasn't enough money coming in to finish them. If at any time in June, the contracts could be liquidated they would be assets to the amount of the liquidation. The Safford job was not considered in my estimate. The Safford job was going on a week before I got there, there was possibly $1,000 worth of labor and material on job. I had been going over job several days before I signed this contract, referring to (Petitioner's Exhibit No. 8 in Evidence).

(Examination by Miss BIRDSALL.)

Norris made statement previously testified to in June, not July, Mr. Norris put it just as I said. Mr. Norris had statements [352] of company before him at that time, but on July 20, he had different statement. On that statement there was an estimate of labor and material necessary to complete

(Testimony of Jerry Lee.)

these contracts. Only way contracts can be liquidated is to finish them. I think McGinty Construction Company had to finish Safford job. It was under construction when I left. [353]

TESTIMONY OF JERRY LEE, FOR PETITIONING CREDITORS.

I am a public accountant and tax auditor admitted to practice before Treasury Department, and in that business twenty odd years. In Phoenix for past three years as public accountant. On August 13, 1929, I was employed by three bonding companies to audit books of Phoenix Plumbing & Heating Company with reference to account claims due the Standard Sanitary Company. Spent eight weeks on job and examined every record in their possession as far back as April, 1928. The books were incomplete and hard to classify as they did not have a recognized method of accounting, no general ledger, no journal. Had a book showing contracts receivable containing only asset side and not liability, also had accounts receivable. There was no control of these and no way to tell whether amounts shown were actual or fictitious. Then they had an accounts payable book and about 1500 or more accumulated checks and some stubs, that constituted bulk of records. There was no general ledger covering time prior to April 21, 1929.

Petitioner's Exhibit No. 5 for Identification, 7 in Evidence, is a cash book for period October 1, 1927, to May 24, 1928, inclusive. It is at best a

(Testimony of Jerry Lee.)

memorandum. There was no other cash book up to April 21, 1929; the new one, Petitioners' Exhibit No. 5 for Identification, 7 in Evidence, opens with "balance day after explosion." There is a gap from May 24, 1928, to April 22, 1929. Exhibit No. 6 for Identification, 7 in Evidence, shows receipts and disbursements from April 22, 1929, and incomplete to July 30, 1929. First entry is April 22, 1929, "Day after explosion Cash in Bank—cash on hand —1451—$443.69." Pet. Ex. 3 for Identification, 7 in Evidence, is record called contracts receivable, shows only asset side of contracts, should be journalized, showing liability side also. No record of liability on contracts, no cost account system kept. It would be hard to identify labor or material going into any one job. Dates [354] in this book in 1929 and 1928, its both prior and subsequent to explosion. Here is one after explosion called Murphy job. Pet. Ex. 2 for Identification, 7 in Evidence, is record of accounts receivable. Dates are in 1928 and 1929, early 1928 to and including 1929. There is no control account. It is hard to say whether amounts are paid or still due. By control account I mean it shows a debit and credit. When we did a job for a person, we charged him with it. That would be the debit side. If he paid it, he would be credited. That is the credit side. Then at the end of a given period we would reconcile our account book on that sheet, if they were balanced and that would indicate that we had credited him with payments he might have made. That is double-

(Testimony of Jerry Lee.)

entry bookkeeping. This is what we used to call the "hook" system. It is a kind of memorandum.

Pet. Ex. 1 for Identification, 7 in Evidence, is accounts payable ledger, first part, second is presumed to be expense accounts. I could find no entries prior to explosion. The bookkeeper told me it was made up after explosion. It probably represents accounts payable. It was intended for general ledger, but was not followed out, used more for memoranda than bookkeeping.

MASTER.—It was initiated as General Ledger?

A. It could have been used for that; if properly followed. It doesn't set up capital assets, capital liabilities, or even bank balance. It's more memoranda than bookkeeping.

Pet. Ex. 9 for Identification, 7 in Evidence, appears to be for purpose of billing customers for small amounts. I never used it. It is marked contracts and extras, but there are no contracts in it. It was probably used for duplicate invoices.

Pet. Ex. 4 for Identification, 7 in Evidence, is weekly time book. Covers period from July 21, 1928, to July 27, 1929, [355] two weeks off not added subsequent to last date. It is kept in accepted manner.

Pet. Ex. 7 for Identification, 7 in Evidence, are two check books, one containing check stubs and unused checks. I used first one but not second. Date of second is July 27, 1929; contains only few stubs. It seems to cover pay-roll.

Pet. Ex. 12 for Identification, 7 in Evidence, con-

(Testimony of Jerry Lee.)

tains checks, bank statements, and more check stubs, constitutes a record of bank account with Commercial National Bank and statement and stubs of check books used by D. L. Francis; also various checks used and referred to in investigation of company's affairs.

It is impossible to find origin of balance carried forward April 22, 1929. It appears nowhere in books. All books are here that were submitted to me by Leo Francis and Fretz on August 15th, 1929. I had access to them after they were turned over to receiver on August 17th.

D. Francis' account appears in accounts payable. Pet. Ex. 1 for Identification, 7 in Evidence, in second part and starts April 26, 1929, and ends June 4, 1929. It is all debits, no amount carried forward; and shows no amounts due D. Francis. It shows payments made during that period out of company funds listed by date, number and amount, and this can be further identified by checking small stubs which show what he paid them for. All are signed by D. Francis. Nothing to indicate they were for business of company.

No.	Date.	Amount.	Payee.
——	Apr. 26–29	$1.00	Cash.
F 78	Apr. 24	2.00	Marlar Drug Co.
F 79	Apr. 24	25.00	————————
F 80	Apr. 28	1.00	J. D. Connor.
F 81	Apr. 24	6.50	Marlar Drug Co.
F 82	Apr. 24	20.00	Doctor Bill. [356]
F 83	Apr. 24	10.00	St. Jos. Hospital.
F 84	Apr. 24	10.00	Dr. Jordan.
F 85	Apr. 24	26.75	St. Jos. Hospital.
F 86	Apr. 24	3.50	Barber Shop.
F 87	Apr. 24	2.00	Groceries.
F 88	Apr. 24	45.00	Berta Francis.
F 89	Apr. 24	4.00	Sun Drug Co.
F 90	Apr. 24	9.00	Pease.
F 91	Apr. 24	6.00	Marlar Drug Co.
F 92	Apr. 24	10.00	Dr. Pease.
F 93	Apr. 27	45.00	Barber Shop.
2498	Apr. 27	45.00	
2528	Apr. 27	148.46	
2531	Apr. 29	16.15	
2547	May 2	48.73	
2586	May 4	45.00	
2587	May 6	2.00	
2616	May 11	45.00	
——	May 11	.25	Cash.
2672	May 18	45.00	
2686	May 18	50.00	

No.	Date.	Amount.	Payee.
2719	May 27	$48.73	Pac. Finance Corp.
F 93	May 22	1.00	Barber.
F 94	May 22	10.00	Father.
F 95	May 22	2.00	Marlar Drug Co.
F 100	May 22	5.00	Elias Francis.
F 102	May 22	30.00	Elias Francis.
——	May 23	.25	Cash.
——	May 23	2.40	Cash.
2729	May 24	2.75	Mtn. States Tel. Co.
2731	May 25	45.00	Berta Francis.
——	May 31	.50	Cash. [357]
F 107	May 27	1.00	————
F 109	May 31	12.00	————
2775	June 1	45.00	Berta Francis
2805	June 4	12.35	Central Ariz. L. & P. Co.
2808	June 4	2.60	City Water Dept.

Total $848.52 in forty days includes salary paid to Berta Francis, five weeks @ $45.00 per week. Lyon Francis has no account, neither has Leo. There is a joint account where brothers were paying Joe Francis, their father. All payments seem to be made in 1929, three debits totaling $108.00, credits are $48.00. Joe Francis has a balance due him of $72.00. It doesn't show what for. Only way to find what amounts paid or credits given D. L. Francis prior to April 21, 1929, is in time book or check stubs. Berta Francis' name is in time book. D. L. Francis is not. I did not look for any canceled checks to him prior to April, 1929, though

there were quite a few in company files. There are two Arizona Garment accounts, one payable and one receivable. By taking checks and check stubs we can tell what payments to Arizona Garment Company were for such as pay-rolls and various things. Petitioners' Exhibit No. 1 for Identification, No. 7 in Evidence, accounts receivable contains account of Arizona Garment Company, April 26, 1929, $35.75. There is no credit showing payment of that account. Joe Thomas Loan Account reads as follows:

April 26, 1929,	payment ck.	#2496....	$180.00
May 4, 1929,	payment ck.	2583....	98.52
May 8, 1929,	payment ck.	2602....	170.00
May 10, 1929,	payment ck.	2611....	50.00
May 11, 1929,	payment ck.	2645....	113.46
May 22, 1929,	payment ck.	F 98....	125.00
May 22, 1929,	payment ck.	F103....	250.00
May 22, 1929,	payment ck.	2724....	100.00
May 27, 1929,	payment ck.	F105....	50.00
		Total.....	1136.98

The other side reads "A Loan Account from Dee Francis to Joe Thomas through company" and shows total credit of 1087.82, as follows: [358]

April 22, 1929, forward U. S. Government 4–12–29, insurance loan.....	$ 241.00
April 23, 1929, Cash.....	5.00
April 27, 1929, U. S. Government Insurance loan	275.00
May 15, 1929, U. S. Government Insurance loan	526.82

(Testimony of Jerry Lee.)

May 22, 1929, Southern Surety Company,
sickness insurance 40.00
Total credit.....$1087.82

Q. I hand you Petitioners' Exhibt No. 12 in Evidence, being checks, Arizona Garment Company, $611.98, and ask if these appeared in the account you have just read, on the debit side.

A. Yes; all five of them appear in this account.

Q. Do they comprise the whole account?

A. No, there are four other checks.

Checks to Joe Thomas, Petitioners' Exhibit No. 10 in Evidence, Nos. 838 for $712 and 2382 for $1,000, are not included in above account. There is no record in any book of these as there is no cash book for April 12, 1929.

(Examination by F. J. DUFFY.)

All checks after April 22, 1929, appear on books, checks for $712.00 and $1,000 payable to Joe Thomas do not appear anywhere in records.

(Examination by Miss BIRDSALL.)

There is no record of Petitioners' Exhibit No. 11 in Evidence check to Carom Mercantile Company dated Mar. 15, 1929 in books of Phoenix Plumbing & Heating Company. There was no cash book covering that period. The Carom check is from check book of Dee Francis. It so appears on stub which is marked "For Factory."

Q. Referring to Petitioners' Exhibit No. 9, check of April 1st, 1928, to Walter Shayab, does that appear on the cash book of April 1, 1928? [359]

A. I have never seen that on the cash book and it doesn't appear in the month of April, 1928.

(Testimony of Jerry Lee.)

Q. Referring to this account, is there an account of Walter Shayab?

(Witness examines book.)

A. Yes, it is spelled a different way here.

Q. What book is that kept in?

A. That is Petitioners' No. 1 for Identification, No. 7 in Evidence—loan account.

Q. What is the record on that?

A. The name is Walter Schaybe, loan account; no year date. May 22, payment check #2,722, $1,-015.00. May 27, check F–106, $205.00, that is the debit side. On the credit side is: April 22, forward $1,015.00; date, ditto, for $205.00; the account appears to be in balance.

Q. There is no record anywhere indicating where that "forward balance" came from? A. No.

Q. The $205 appears as brought forward, too?

A. Yes.

Q. What is the date of that $205?

A. April 22 is marked "ditto."

Q. Would that be 1929?

A. It must have been, as the book wasn't made up until 1929.

Q. What is the date of the check?

A. March, 1928.

Q. Is that account of Walter Shayab shown in the check stubs of that year?

A. I have no stubs on that date. It is shown on the cash book as of May 27, 1929—the payment of that check to Schaybe; [360] that is No. F–106.

Q. On this check of April 1, 1928, that is marked F–106, is that on a book of May, 1929? A. Yes.

(Testimony of Jerry Lee.)

Q. And the former stubs of May, 1929, are numbered F–100—is that correct? A. Yes.

Q. Will you refer to stub No. 2722 in the other book and see if that is the same?

A. (Reading:) "May 20, 1929, $1015.00." It says "Charge to Arizona Garment Mfg. Company."

Q. What is the record on the cash book?

A. This entry was in lieu of that smaller check; that is marked, "Schaybe. Charge to Arizona Garment Co."

Q. Is there any charge against the Arizona Garment Company for that check?

A. No, nor is there a charge against Joe Thomas.

Q. There is no record of the $1,015 check except the stub?

A. There is the cash book entry.

Q. Just read that entry?

A. Cash book, page 13, dated May 22, 1929, line 18, shows Mr. Schaybe; the entry has been erased and is blurred and there appears to be a 60-day loan, check No. 2722, total amount $1,015.00. Charge in the general ledger claim and marked "loan account." It is changed in both places.

Q. Is there a record on the cash book of May 27th, 1929, indicating anything regarding the $205 payment which you have just testified to as showing on the loan account of Walter Shaybe subsequent to the $1,015 payment?

A. This is on Book #6 for Identification, #7 in Evidence. On page 15, disbursement side of the cash book, line 10. "May 27, 1929," there is an

(Testimony of Walter Thalheimer.)

entry "F–106, Walter Shaybe, $205.00." General ledger claim. [361]

Q. Entry is made as of that date? A. Yes.

TESTIMONY OF WALTER THALHEIMER, FOR PETITIONING CREDITORS (RECALLED).

I have here further records of the Phoenix Plumbing & Heating Company consisting of mutilated checks and vouchers admitted as:

(Petitioners' Exhibit No. 18 in evidence) the originals of which are filed with this record for the reason that they are of such a nature that copies thereof cannot be inserted herein.

Also cancelled checks and stubs introduced as (Petitioners' Exhibit No. 19 in evidence) originals of which are filed herewith.

Statements of dealings with Standard Sanitary Company (Petitioners' Exhibit No. 20 in evidence), originals of which are filed herewith.

Miscellaneous statements from various firms to company (Petitioners' Exhibit No. 21 in evidence), originals of which are filed herewith.

Complaint and amended complaint in Bachowetz case (Petitioners' Exhibit No. 22 and 23 in Evidence). [362]

B.–522.

PETITIONERS' EXHIBIT No. 22.

In Evidence.
12–3–29.

In the Superior Court of Maricopa County, State of Arizona.

No. 31,031.

SIDNEY P. OSBORN and NERI OSBORN, Jr.,
Plaintiffs,

vs.

W. J. BACHOWITZ and ROSE BACHOWITZ, His Wife, VICTOR F. RODRIQUEZ, E. H. WHEAT, WALTER DUBREE, CLINTON CAMPBELL, LUTHER HILL, JAMES A. BOYD, O. M. MOORE, H. L. and A. J. CHRISTIAN, ALLISON STEEL MANUFACTURING COMPANY, a Corporation, PHOENIX BUILDERS' SUPPLY COMPANY, a Corporation, C. P. MUNGER ROCK COMPANY, a Corporation, ARIZONA SASH AND DOOR COMPANY, a Corporation, and JOHN DOE and JANE DOE, & PHOENIX PLUMBING & HEATING CO.,

Defendants.

SUMMONS.

The State of Arizona to: W. J. Bachowitz and Rose Bachowitz, His Wife; Victor F. Rodriquez;

E. H. Wheat; Walter Dubree; Clinton Campbell; Luther Hill; James A. Boyd; O. M. Moore; H. L. and A. J. Christian; Allison Steel Manufacturing Company, a Corporation; Phoenix Builders' Supply Company, a Corporation; C. P. Munger Rock Company, a Corporation; Arizona Sash and Door Company, a Corporation; and John Doe and Jane Doe, Defendants, GREETING:

YOU ARE HEREBY SUMMONED AND REQUIRED to appear in an action brought against you by the above-named plaintiffs in the Superior Court of Maricopa County, State of Arizona and answer the Complaint therein filed with the Clerk of said Court, at Phoenix, in said County, within twenty days after the service upon you of this Summons, if served in this said County, or in all other cases within thirty days thereafter, the times above mentioned being exclusive of the day of service, or judgment by default will be taken against you.

Given under my hand and the seal of the Superior Court of Maricopa County, State of Arizona this 22d day of October, 1929.

WALTER S. WILSON,
Clerk of the Superior Court.
By M. B. Fitts,
Deputy Clerk.

Acceptance of service 10–25–29.

W. J. T.

B.–522. Petitioners' Exhibit No. 14 for Identification. [363]

B.–522.

PETITIONERS' EXHIBIT No. 22.
In Evidence.
12–3–29.

Back of Exhibit:

State of Arizona,
County of Maricopa,—ss.

I HEREBY CERTIFY that I received the within Summons on the —— day of ————, A. D. 1929, at the hour of —— M., and personally served the same on the —— day of ———, A. D. 1929, ————, being the defendant — named in said Summons, by delivering to ————, County of Maricopa, a copy of said Summons, to which was attached a true copy of the complaint mentioned in said Summons.

Dated this —— day of ————, A. D. 1929.

————————,
Sheriff.

By ————————,
Deputy Sheriff.

Fees, Service..... $————
Copies ..... $————
Travel —— miles..... $————
Publication ..... $————
Total ..... $————

No. ——. In the Superior Court of Maricopa County, State of Arizona. Sidney P. Osborn and Neri Osborn, Jr., Plaintiffs, vs. W. J. Bachowitz and Rose Bachowitz, His Wife, et al., Defendants. Summons. [364]

In the Superior Court of the County of Maricopa in and for the State of Arizona.

No. 31,031.

SIDNEY P. OSBORN and NERI OSBORN, Jr.,
Plaintiffs,

vs.

W. J. BACHOWITZ and ROSE BACHOWITZ, His Wife, VICTOR F. RODRIQUEZ, E. H. WHEAT, WALTER DUBREE, CLINTON CAMPBELL, LUTHER HILL, JAMES A. BOYD, O. M. MOORE, H. L. and A. J. CHRISTIAN, ALLISON STEEL MANUFACTURING COMPANY, a Corporation, PHOENIX BUILDERS' SUPPLY COMPANY, a Corporation, C. P. MUNGER ROCK COMPANY, a Corporation, ARIZONA SASH AND DOOR COMPANY, a Corporation, and JOHN DOE and JANE DOE,

Defendants.

COMPLAINT.

Come now the plaintiffs, Sidney P. Osborn and Neri Osborn, Jr., through their attorney, H. S. McCluskey, and for cause of action against defendants, complain and allege, as follows:

I.

That the plaintiffs, Sidney P. Osborn and Neri Osborn, Jr., and each of them, are residents of the

City of Phoenix, County of Maricopa, State of Arizona.

That the defendants, W. J. Bachowitz and Rose Bachowitz, his wife, and each of them, are residents of the City of Phoenix, County of Maricopa, State of Arizona.

That the defendants, Victor F. Rodriquez, E. H. Wheat, Walter Dubree, Clinton Campbell, Luther Hill, James A. Boyd, O. M. Moore, H. L. and A. J. Christian, are all of them residents of the City of Phoenix, County of Maricopa, State of Arizona;

That the defendant, Allison Steel Manufacturing Company, is a corporation, duly incorporated and existing under and by virtue of the laws of Arizona, with its principal place of business in the City of Phoenix, County of Maricopa, State of Arizona; [365]

That the defendant, C. P. Munger Rock Company, is a corporation, duly incorporated and existing under and by virtue of the laws of Arizona, with its principal place of business in the City of Phoenix, County of Maricopa, State of Arizona;

That the defendant, Arizona Sash and Door Company, is a corporation, duly incorporated and existing under and by virtue of the laws of Arizona, with its principal place of business in the City of Phoenix, County of Maricopa, State of Arizona;

That John Doe and Jane Doe are unknown to the plaintiffs and such names are fic*i*tious names and the plaintiffs pray to be allowed to insert the true names of said persons, corporations or partner-

ships, when discovered, with the same effect as if said names had been properly and correctly written herein at this time.

II.

That on or about the 1st day of February, 1928, the defendants, W. J. Bachowitz and Rose Bachowitz, his wife, became and were justly indebted to J. W. Sullivan, of Prescott, Yavapai County, State of Arizona, in the sum of Four Thousand Seven Hundred ($4,700.00) Dollars, and being so indebted, in consideration thereof, and for value received, the said defendants, W. J. Bachowitz and Rose Bachowitz, his wife, made, executed and delivered to the said J. W. Sullivan, a certain promissory note for the sum of Four Thousand Seven Hundred ($4,700.00) Dollars, with interest thereon at the rate of Seven (7) per cent per annum, as will more fully appear by the said instrument, ready to be produced in court, and by a copy of the same herewith filed and marked Exhibit "A" and made a part of this complaint;

That to secure the payment of the principal sum and interest above mentioned, the said defendants, W. J. Bachowitz [366] and Rose Bachowitz, his wife, by their deed, dated the 1st day of February, 1928, conveyed to J. W. Sullivan, in fee simple, the following described parcel of land, with the appurtenances, situated in the City of Phoenix, County of Maricopa, State of Arizona, to wit:

Lot two (2) in Block six (6) East Evergreen Addition according to the map or plat thereof

on file and of record in the office of the County recorder of Maricopa County, State of Arizona, in Book 3 of Maps at page 55 thereof;

and the deed to which is recorded in the office of the County Recorder of Maricopa County, State of Arizona, in Book of Mortgages No. 218 at page 173, subject, however, to a condition of defeasance upon the payment of the principal and interest aforesaid, according to the tenor and effect of the said instrument, which said mortgage was, on the day of its date, duly acknowledged by the said defendants, W. J. Bachowitz and Rose Bachowitz, his wife, and on the 4th day of February, 1928, recorded in the office of the Recorder of the County of Maricopa, State of Arizona, at 9:09 o'clock in the forenoon of said day, in Book 209 of Mortgages, on pages 255 and 256, as, by the said mortgage and its accompanying certificates of acknowledgment and recording, ready to be produced in court, and by a copy thereof herewith filed and marked Exhibit "B," and made a part of this complaint, will more fully appear.

III.

That the plaintiffs herein aver that the said promissory note and mortgage were on the 6th day of October, 1929, and before the commencement of this action, duly assigned, transferred, delivered and endorsed to the plaintiffs herein for a valuable consideration, and which assignment of promissory note and mortgage on the day of its date, duly acknowledged, and afterwards on the 9th day of Oc-

tober, 1929, recorded in the office of the Recorder for the County of Maricopa, State of [367] Arizona, at 11:27 o'clock in the forenoon of said day in Book No. —— of ——— on page ——; as by the said Assignment of Mortgage and its accompanying certificates of acknowledgment and recording, ready to be produced in court, and by a copy thereof herewith filed and marked Exhibit "C," and made a part of this complaint, will more fully appear.

IV.

That the defendants, W. J. Bachowitz and Rose Bachowitz, his wife, failed to comply with the conditions of the said promissory note and mortgage by omitting to pay the sum of Four Thousand Seven Hundred ($4,700.00) Dollars, with interest thereon at the rate of seven (7) per cent per annum, which by the terms of said note and mortgage became due and payable on or before the first day of November, 1928, the interest being payable at maturity; and that there is now justly due to the plaintiffs the sum of Four Thousand Seven Hundred ($4,700.00) Dollars principal with interest thereon in the amount of Two Hundred and Forty-six and 75/100 ($246.75) Dollars with interest from the first day of November, 1928, on the said Four Thousand Seven Hundred ($4,700.00) Dollars and the said Two Hundred and Forty-six and 75/100 Dollars ($246.75), at the rate of ten (10) per cent per annum as was specifically covenanted and agreed upon in the said mortgage and note.

V.

That the defendants, J. W. Bachowitz and Rose Bachowitz, his wife, failed to comply with the conditions of the said mortgage by omitting to pay to the proper officers all taxes and assessments assessed upon the said property or upon or within described note and mortgage, when the same became due, and to deliver the receipts therefor to the mortgagee, his representative or assigns, as was duly required of them, so to do, in the said mortgage heretofore described. And the mortgagee, J. W. Sullivan, because of default of the said defendants to [368] pay the said taxes and assessments and in order to maintain his liens, was compelled to pay state, county, school district and city taxes and street improvement assessments and the interest thereon, assessed upon the said property, as follows, to wit:

November 5, 1928, state and county and school district taxes	$ 25.96
March 15, 1929, City of Phoenix taxes	15.25
March 15, 1929, City of Phoenix taxes	15.24
October 14, 1929, Interest on street improvement assessment	13.43
October 14, 1929, Principal on street improvement assessment	125.34
	$195.22

That plaintiffs in order to maintain their liens were compelled to pay state, county, school district and city taxes and interest and penalties and fees on delinquent taxes assessed upon said property

covered by the said mortgage heretofore described, as follows, to wit:

October 11, 1929, State and county taxes, school district taxes, interest and penalties and fees	28.46
October 14, 1929, City of Phoenix taxes	43.82
October 21, 1929, State, county and school district taxes	95.89
	$168.17

And on the 11th day of October, 1929, to pay to the Superintendent of Streets, of the City of Phoenix, Three Hundred and Sixty-four and 94/100 ($364.94) Dollars in order to redeem the said property, which had been sold to the City of Phoenix for nonpayment of principal and interest, advertising and penalty of assessment issued to represent the cost of improvements on Portland Street from the east line of Central Avenue to the west line of Seventh Street, on the said City, as by the reecipts therefore, ready to be produced in court, and by copies of the same herewith filed and marked Exhibit "D," Exhibit "E," Exhibit "F," Exhibit "G," Exhibit "H," Exhibit "I," and Exhibit "J" and made a part of this complaint, will more fully appear; and that in addition to the sums mentioned in paragraph IV hereof there is due to the plaintiffs, from the defendants, the sum of Seven Hundred and Twenty-eight and 33/100 ($728.33) Dollars, with interest thereon at the rate of six per cent per annum upon the several afore-

mentioned amounts from the date of [369] the payment thereof until paid.

VI.

That in the said note and mortgage it was expressly agreed that in case of the foreclosure of said note and mortgage by proceedings in court the said defendants, J. W. Bachowitz and Rose Bachowitz, his wife, agreed to pay ten per cent additional on the amount found due thereunder and plaintiffs claim that by the filing of this complaint under this clause in said note and mortgage there is now due to plaintiffs, for attorney's fees, Four Hundred and Ninety four and 68/100 ($494.68) Dollars, in addition to the sums heretofore mentioned in paragraphs IV and V of this complaint.

VII.

That no other action has been brought to recover any part of the mortgage debt and that no part of the said mortgage debt has been collected.

VIII.

Plaintiffs further represent and charge that the said premises described in said mortgage are meager and scant security for the said sum of Four Thousand Seven Hundred ($4,700.00) Dollars and interest mentioned in the said note, deed and mortgage and the other amounts due these plaintiffs.

IX.

That plaintiffs allege and state on information and belief that Victor Rodriquez, E. H. Wheat, Walter Dubree, Clinton Campbell, Luther Hill,

James A. Boyd, O. M. Moore, H. L. and A. J. Christian, Allison Steel Manufacturing Company, a corporation, Phoenix Builders' Supply Company, a corporation, C. P. Munger Rock Company, a corporation, Arizona Sash and Door Company, a corporation and John Doe and Jane Doe have or claim to have some interest in the said mortgaged premises, or some part thereof, as purchasers, mortgagees, judgment creditors, and/or liens for labor and materials, or otherwise, which [370] interest, or liens, if any, they have accrued subsequently to the lien of the said mortgage of the plaintiffs and the same are subject hereto: The plaintiffs, therefore, demand that the defendants and all persons claiming under them subsequent to the commencement of this action may be barred and foreclosed of all right, claim, lien and equity of redemption in said mortgaged premises, or any part thereof, that the said premises, or so much thereof as may be sufficient to raise the amount due to the plaintiffs for principal, interest and interest thereon, payment of taxes, interest, fees, penalties and assessments for improvements and interest thereon and costs, and which may be sold separately without material injury to the parties interested, may be decreed to be sold according to law; that out of the moneys arising from the sale thereof the plaintiffs may be paid the amounts due on the said promissory note and mortgage, with interest, at the rate of ten per cent per annum to the time of such payments, and for reimbursement for the taxes, interest, penalties and fees and assessments

for improvements with the legal rate of interest thereon from the date of the payment of the same to the time of such payment and for attorney's fees, costs and expenses of this action so far as the amount of such moneys properly applicable thereto will pay the same; and that the defendants, W. J. Bachowitz and Rose Bachowitz, his wife, may be adjudged to pay any deficiency which may remain after applying all of said moneys so applicable thereto; and that the plaintiffs may have such other relief, or both, in the premises as shall be just and equitable.

H. S. McCLUSKEY,
Attorney for Plaintiffs.
407 Ellis Building, Phoenix, Arizona.

SIDNEY P. OSBORN.
NERI OSBORN, Jr. [371]

State of Arizona,
County of Maricopa,—ss.

Sidney P. Osborn and Neri Osborn, Jr., being first duly sworn, each for himself, and not one for the other, deposes and says that he is the person mentioned in, and who subscribed to the foregoing complaint, as a plaintiff therein, that he has read the complaint and believes the contents thereof to be true of his own knowledge, except as to those matters and things stated upon information and belief, and as to those he believes it to be true.

SIDNEY P. OSBORN.
NERI OSBORN, Jr.

Subscribed and sworn to before me this 21 day of October, 1929.

[Seal] H. S. McCLUSKEY,
Notary Public.

My commission expires Aug. 29, 1933. [372]

EXHIBIT "A."

Esc. 16179 J. B. M./W.

Phoenix, Arizona, February 1st, 1928.

$4700.

On or before November 1st, 1928, for value received, we, or either of us promise to pay to J. W. Sullivan, or order, at ——, the sum of Four Thousand Seven Hundred and No/100 Dollars, with interest thereon from February 1st, 1928 to maturity of this note, at the rate of seven per cent per annum, payable at maturity.

Should the interest as above not be paid when due, it shall thereafter bear interest at ten per cent per annum until paid.

Should the principal hereof not be paid in full at maturity, it shall thereafter bear interest at ten per cent per annum until paid. Principal and interest payable in lawful money of the United States of America.

Should suit be brought to recover on this note, we promise to pay as attorney's fees ten per cent additional on the amount found due hereunder.

This note is secured by a mortgage upon real property.

W. J. BACHOWITZ.
ROSE BACHOWITZ,
By Her Attorney-in-fact.

Prescott, July 24, 1928.

I am sending this note to my attorneys, Baker and Whitney, Phoenix by their request to be held by them for me pending a certain lien on my property.

J. W. SULLIVAN. [373]

EXHIBIT "B."

MORTGAGE.

KNOW ALL MEN, That W. J. Bachowetz and Rose Bachowetz, his wife, of Maricopa County, Arizona, hereinafter referred to as the Mortgagors, in consideration of Four Thousand Seven Hundred and No/100 Dollars, in hand paid by J. W. Sullivan hereinafter referred to as the Mortgagee the receipt of which is hereby acknowledged, do hereby grant, bargain, sell and convey to the Mortgagee his heirs and assigns forever, the following real estate, lying and being in the County of Maricopa, State of Arizona, known and described as

> Lot 2, Block 6, East Evergreen, an Addition to the City of Phoenix, according to the plat of record in the office of the County Recorder of Maricopa County, Arizona, in Book 3 of Maps, page 55 thereof;

TO HAVE AND TO HOLD the above described premises together with all the privileges and appurtenances thereunto belonging unto the mortgagee, his heirs, executors, administrators or assigns forever. And the mortgagors hereby covenant that they are well and truly seized of a good and perfect title to the premises above conveyed in the law, in fee simple, and have good right and lawful authority

to convey the same, and that the title so conveyed is clear, free and unincumbered and that they will forever warrant and defend the same to the mortgagee against all claims whatsoever.

PROVIDED ALWAYS, and these presents are upon this express condition that if the mortgagors shall pay to the mortgagee the just and full sum of Four Thousand Seven Hundred and No/100 Dollars, with interest thereon, according to the terms and conditions of one certain promissory note bearing even date herewith, due on or before November 1st, 1928, with interest thereon at 7% per annum, payable at maturity, and made and [374] executed by Mortgagors herein and payable to the order of the mortgagee and shall moreover pay to the proper officers all taxes and assessments, general or special, which shall be levied or assessed upon said real estate on or before the date when such taxes or assessments shall have become delinquent, and insure and keep insured the buildings on said premises against loss or damage by fire, in the sum of ..... Dollars in insurance companies to be selected by the mortgagee, and the policies of insurance assigned or made payable to the said mortgagee, as ..... interests may appear, until payment in full of said promissory note, and interest thereon, then these presents shall be null and void. In case of the non-payment of any sum of money (either of principal, interest or taxes) at the time or times when the same shall become due, or failure to insure said buildings according to the conditions of these presents, then the mortgagee may pay same and add the

amount so paid to the sum secured by this mortgage and in any such case, or in case of the failure on the part of the mortgagors to keep or perform any other agreement, stipulation or condition herein contained, or contained in the note above described, the whole amount of the said principal sum shall at the option of the mortgagee be deemed to have become due, and the same with interest thereon at the rate of ten (10) per cent per annum from the date of exercising said option, shall thereupon be collectible in a suit at law, or by foreclosure of this mortgage, in the same manner as if the whole of said principal sum had been made payable at the time when any such failure shall occur as aforesaid.

And the mortgagors do further covenant and agree to keep the mortgaged property in good condition and not to permit any waste or deterioration thereof, and in case complaint is filed for a foreclosure of this mortgage, the mortgagee shall [375] be entitled to the appointment of a Receiver without bond to take possession of the mortgaged premises and collect the rents and profits thereof pending foreclosure proceedings and up to the time of redemption or issuance of sheriff's deed, and in case of such foreclosure the mortgagors will pay to the mortgagee in addition to the taxable costs of the foreclosure suit ten per cent (10%) as attorney's fees, on the amount found due, together with a reasonable fee for title search made in preparation and conduct of such suit, which shall be a lien on said premises and secured by this mortgage, and in case of settlement after suit is brought, but before trial,

the mortgagors agree to pay one-half of the above attorney's fees as well as all payments that the mortgagee may be obliged to make for his security.

The covenants herein contained shall extend to and be binding upon the heirs, executors, administrators, successors and assigns of the respective parties hereto.

IN WITNESS WHEREOF, The mortgagors have hereunto set their hands this 1st day of February, A. D. 1928.

By W. J. BACHOWETZ. (Seal)
ROSE BACHOWETZ. (Seal)
By W. J. BACHOWETZ. (Seal)
Attorney-in-fact. (Seal)

Signed and sealed in presence of

State of Arizona,
County of Maricopa,—ss.

Before me, J. J. Barkley, a Notary Public in and for the County of Maricopa, State of Arizona, on this day personally appeared W. J. Bachowetz, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purpose and consideration therein expressed.

Given under my hand and seal of office, this 1st day of February, A. D. 1928.

[Seal] J. J. BARKLEY,
Notary Public.

My commission expires July 14, 1930. [376]

State of Arizona,
County of Maricopa,—ss.

Before me, J. J. Barkley, a Notary Public in and for said County, State of Arizona, on this day personally appeared W. J. Bachowetz known to me to be the person whose name is subscribed to the foregoing instrument as the Attorney in Fact of Rose Bachowetz, and acknowledged to me that he subscribed the name of the said Rose Bachowetz thereto as principal and his own name of Attorney in Fact, and as such Attorney in Fact he executed said instrument for the purpose and consideration therein expressed.

Witness my hand and seal of office this 1st day of Feburary, A. D. 1928.

[Seal] J. J. BARKLEY,
Notary Public.

My commission expires July 14, 1930.

Filed and recorded at request of J. W. Sullivan, Feb. 4, 1928, at 9:09 A. M.

W. H. LINVILLE,
County Recorder.
By Addie F. Mauzy,
Deputy.

#3663.
State of Arizona,
County of Maricopa,—ss.

I, J. K. Ward, County Recorder in and for the County and State aforesaid, hereby certify that I have compared the foregoing copy with the record

of mortgage from W. J. Bachowetz and Rose Bachowetz, his wife, to J. W. Sullivan, filed and recorded in my office on the 4th day of February, 1928, in Book No. 209 of Mortgages at Pages 255–256, and that the same is a full, true and correct copy of such record and of the whole thereof.

Witness my hand and seal of office, this 21st day of October, A. D. 1929.

[Seal]

J. K. WARD,
County Recorder.
By Roger G. Laveen,
Deputy. [377]

EXHIBIT "C."

ASSIGNMENT OF MORTGAGE.

KNOW ALL MEN BY THESE PRESENTS: That J. W. Sullivan, of Prescott, Arizona, the party of the first part, for and in consideration of the sum of Ten Dollars to him in hand paid by Sidney P. Osborn and Neri Osborn, Jr., the parties of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, assign, transfer and set over unto the said parties of the second part, a certain Indenture of Mortgage bearing date the First day of February, one thousand nine hundred twenty-eight, made and executed by W. J. Bachowitz and Rose Bachowitz, his wife, to J. W. Sullivan, which said mortgage was recorded on the 4th day of February, 1928, in Book 209 of Mortgages, pages 255–256, in the office of the County Recorder of Maricopa County, Arizona.

Together with the note therein described, and the money d*ye* and to become due thereon, with the interest.

And the said party of the first part does hereby make, constitute and appoint the said parties of the second part his true and lawful attorney, irrevocable, in his name, or otherwise, but at the proper costs and charges of the said parties of the second part, to have, use and take all the lawful ways and means for the recovery of the said money and interest; and in case of a payment to discharge the same as fully as the said party of the first part might or could do if these presents were not made.

IN WITNESS WHEREOF, said party of the first part has hereunto set his hand this 8 day of October, A. D. 1929.

J. W. SULLIVAN.

Signed and delivered in the presence of
H. R. WOOD. [378]

EXHIBIT "D."

No. 17729
33

RECEIPT FOR TAXES FOR THE YEAR 1928.
Maricopa County, Arizona.

First Installment
(Due Sept. 3, 1928.
(Delinquent Nov. 5, 1928.
Second Installment
(Due March 4, 1929.
(Delinquent May 6, 1929.

Compare at once with description of your property and see that it is correct.

Assessed to J. W. Sullivan, Phoenix, Arizona. Nov. 5, 1928. In payment as shown of taxes for the year 1928 levied against the property described here on, as indicated by the assessment rolls of Maricopa County.

Description	Lot or sec.	Block or acres	Valuations Real Estate	State and County Property Tax
E. Evergreen	2	6	145	32.40

School Bond Tax Dist. No. 1	Total Tax	Delinquent Tax
19.53	$51.93	$25.96

Paid
JOHN D. CALHOUN,
(Paid Stamp) County Treas.
By R. E.
Paid by RUTH EDWARDS.
J. W. SULLIVAN. [379]

EXHIBIT "E."

Office of City Assessor and Ex-Officio City Collector of the City of Phoenix, Maricopa County, Arizona.

Phoenix, Arizona, 10/14/29.
No. 208.

The City Tax for the fiscal year 1928–1929, on the following-described property, the same being assessed to W. J. & Rose Bachowitz, is as follows: E. Evergreen, Lot 2, Block 6, Real Est. Tax Valuations 1930 .....$30.49
1st Inst. 15.25 & Pen. 2.28 paid 3/15/29 Rec. 24248.
2nd Inst. 15.24 paid 3/15/39 Rec. 7112.

LANNAS S. HENDERSON,
City Assessor and *Ex-officio* City Collector.
B. [380]

EXHIBIT "F."

This is to certify that the interest due June 1st, 1928, in the amount of $13.43 and interest and principal due Dec. 1, 1928, in the amount of $125.34 was paid at this office by J. W. Sullivan, on Lot 2, Block 6, East Evergreen Addition to the City of Phoenix, Series #3, Assm. 26.

Signed ————————————,
Superintendent of Streets.
By M. B. HARTLINE. [381]

EXHIBIT "G."

No. 5531.

RECEIPT FOR THE YEAR '28.

Maricopa County, Arizona.

Assessed to J. W. Sullivan, Phoenix, Arizona, October 11, 1929, in payment as shown of taxes levied against property described hereon, as indicated by the assessment-rolls of Maricopa County.

Description	Lot	Block	Valuations Real Estate	State and County Prop. Tax	Schl. Tax Dist. No. 1	Total Tax
East Evergreen	2	6	1415	22.40	19.53	51.93

JOHN B. CALHOUN,
Tax Collector.
By GORDON OSBORN,
Deputy.

Paid by SIDNEY P. OSBORN
210 First Natl. Bk.,
Phoenix, Arizona.
October 11, 1929.
Second Installment.

Paid on this tax for year shown.

Delinquent tax	25.97
Line fee	.15
Interest	1.30
Penalty	1.04
Total	28.46
Paid	28.46

[382]

EXHIBIT "H."

City of Phoenix, Arizona. Current Tax Receipt No. 63.
Dated October 14, 1929.

W. J. & Rose Bachowitz.
By J. W. Sullivan.

City Taxes for the Fiscal Year 1929–1930.

Addition	Lots	Block	Land	Improvements	Total	Amt. of Taxes
E. Evergreen	2	6	3955	3000	6955	87.63
			Paid first half			43.82
			Bal. due			43.82

Received Payment.

LANNAS S. HENDERSON,
City Assessor and Ex-officio City Collector.
KAY ROBINSON,
Deputy. [383]

EXHIBIT "I."

No. 665
Vol. 2

STATE AND COUNTY TAX RECEIPT—1929.

Maricopa County, Arizona.

JOHN D. CALHOUN,

County Treasurer and Ex-officio Tax Collector.

Paid by SIDNEY P. OSBORN,

210 First Natl. Bk. Bldg.

Description	Lot	Block	Valuations Rl. Est.	Imp.	State & Co. Property Tax	Schl. Bond Tax Dist. No. 1	Total Tax
E. Evergreen	2	6	1555	3000	128.91	62.86	191.77

First Installment 95.89 Second Installment 95.88

Assessed to

W. J. & ROSE BACHOWITZ.

Paid by

SIDNEY P. OSBORN.

(Paid Stamp of)
(John D. Calhoun)
(County Treas.)
(dated Oct. 21, 1929) [384]

"EXHIBIT "J."

No. 200.

CERTIFICATE OF SALE OF PROPERTY.

Sold for the non-payment of Principal and Interest, Advertising and Penalty of Assessment issued to represent the cost of improvement of PORTLAND STREET from the East line of Central Avenue to the West line of Seventh Street in the City of Phoenix, County of Maricopa, State of Arizona, Bond Series No. 3.

This instrument is to certify that on the 31st day of August, 1929, at the hour of 10:04 A. M., of said day, under and by virtue of the authority vested in me by Chapter 144 of the Session Laws of the State of Arizona of 1919, and amendments thereto, relating to the sale of property for non-payment either of the principal or of the interest, penalty, advertising or cost accruing account of the assessments for the improvement of streets, I. B. E. GILPIN, as Deputy Superintendent of Streets of the City of Phoenix, sold to City of Phoenix the following described lot, piece or parcel of land, situate, lying and being in the City of Phoenix, County of Maricopa, State of Arizona, and more particularly described as follows, to-wit: Lot 2, Block 6, East Evergreen, for the sum of three hundred forty-seven and 56/100 ($347.56) Dollars, which said amount was paid by the said City of Phoenix for said property.

That the said City of Phoenix was the one who was willing to take the least quantity of said lot,

piece or parcel of land at said sale and pay amount due and unpaid upon that certain Assessment No. 26 Bond Series No. 3, issued to represent the assessment upon Lot 2, Block 6, East Evergreen for the improvement of PORTLAND STREET from the East line of Central Avenue to the West line of Seventh Street together with costs; the name of the owner of the property so sold, as given on the record of the assessment is unknown.

That the property herein described was sold by me for the said sum of three hundred forty-seven and 56/100 (347.56) Dollars, that sum being the total amount of the principal and interest together with penalty, advertising and cost due and unpaid upon the said assessment, together with costs, and the items of which are as follows, to-wit:

Amount of unpaid principal of Assessment	$335.74
Amount of unpaid interest on Assessment	10.07
Penalty	.50
Advertising	1.25
Certificate of Sale	
Costs	
	$347.56

The above-named purchaser will be entitled to a deed for the above described property on the 21st day of August, 1930, upon giving notice and application therefor as provided by Chapter 144 of the Session Law of the State of Arizona of 1919, and amendments thereto, unless sooner redeemed, according to said Act.

Dated and filed in the office of the Superintendent of Streets of the City of Phoenix, this 31st

day of August, 1929, the same being the date of the sale.

B. E. GILPIN,
Deputy Superintendent of Streets.

Release on redemption in full dated October 11th, 1929, by Sidney P. Osborn for the sum of $364.94.

W. J. JAMIESON,
Superintendent of Streets. [385]

B.–522.

PETITIONERS' EXHIBIT No. 23.
In Evidence.
12–3–29.

In the Superior Court of the County of Maricopa, State of Arizona.

No. 31031–C.

SIDNEY P. OSBORN and NERI OSBORN, Jr.,
Plaintiffs,

vs.

W. J. BACHOWETZ and ROSE BACHOWETZ, His Wife; VICTOR F. RODRIGUEZ; E. H. WHEAT; PHOENIX BUILDERS' SUPPLY COMPANY, a Corporation; ALLISON STEEL MANUFACTURING COMPANY, a Corporation; CLINTON CAMPBELL Personally, and as Trustee, and LENA CAMPBELL, His Wife; C. P. MUNGER ROCK COMPANY, a Corporation; WALTER DUBREE; H. L. CHRIS-

TIAN; A. J. CHRISTIAN; D. L. FRANCIS, LYON FRANCIS and LEO FRANCIS, Doing Business Under the Firm Name and Style of PHOENIX PLUMBING AND HEATING COMPANY; LUTHER HILL; JAMES A. BOYD; O. M. MOORE; ARIZONA SASH-DOOR & GLASS COMPANY, a Corporation; WALTER J. THALHEIMER, Receiver for Phoenix Plumbing and Heating Company,

Defendants.

AMENDED COMPLAINT.

Come now the plaintiffs by their attorneys and for cause of action against defendants complain and allege:

I.

That the plaintiffs and each of them are residents of Maricopa County, Arizona; that the defendants W. J. Bachowetz and Rose Bachowetz, his wife, Victor F. Rodriquez, E. H. Wheat, Walter Dubree, Clinton Campbell and Lena Campbell, his wife, O. M. Moore, H. L. Christian and A. J. Christian, are each and all, plaintiffs are informed and believe, residents of Maricopa County, Arizona; that the defendants C. P. Munger Rock Company, Arizona Sash-Door & Glass Company, Allison Steel Manufacturing Company and Phoenix Builders' Supply Company, are corporations organized and existing under and by virtue of the laws of the [386] State of Arizona, and doing Business in Maricopa County therein; that the de-

fendants Luther Hill and James A. Boyd, plaintiffs are informed and believe, are each of them non-residents of the State of Arizona, and the place of residence of each of said defendants is unknown to these plaintiffs; that the defendants D. L. Francis, Lyon Francis and Leo Francis, doing business under the name and style of Phoenix Plumbing and Heating Company, plaintiffs are informed and believe, are residents of Maricopa County, Arizona; that Walter J. Thalheimer, Receiver for Phoenix Plumbing and Heating Company, is a resident of Maricopa County, Arizona.

II.

That on or about the 1st day of February, 1928, at Phoenix, Maricopa County, Arizona, the defendants W. J. Bachowetz and Rose Bachowetz, his wife, made, executed and delivered to J. W. Sullivan in said Phoenix, Maricopa County, Arizona, their promissory note in writing for the sum of Forty-seven Hundred ($4700.00) Dollars, with interest and attorneys' fees as therein provided, which said note is in words and figures as follows, to wit:

$4700.00. Esc. 16179 J. B. M./W.

Phoenix, Arizona, February 1st, 1928.

On or before November 1st, 1928, for value received, we, or either of us promise to pay to J. W. Sullivan, or order, at ——— the sum of Four Thousand Seven Hundred and no/100 Dollars, with interest thereon from February 1st, 1928, to maturity of this note, at the rate of seven per cent per annum, payable at maturity.

Should the interest as above not be paid when due, it shall thereafter bear interest at ten per cent per annum until paid.

Should the principal hereof not be paid in full at maturity, it shall thereafter bear interest at ten per cent per annum until paid. Principal and interest payable in lawful money of the United States of America.

Should suit be brought to recover on this note, we promise to pay as attorney's fees ten per cent additional on the amount found due hereunder.

This note is secured by a mortgage upon real property.

W. J. BACHOWETZ,
ROSE BACHOWETZ,
By Her Attorney-in-fact. [387]

That said note contains the following writing on the back thereof:

Prescott, July 24, 1928.

I am sending this note to my attorneys, Baker and Whitney, Phoenix, by their request to be held by them for me pending a certain lien on my property.

J. W. SULLIVAN.

III.

That in order to secure the payment of the principal sum of said promissory note the interest thereon and attorneys' fees as therein mentioned and provided said defendants W. J. Bachowetz and Rose Bachowetz, his wife, did execute and deliver to said J. W. Sullivan at Phoenix, Maricopa County, Arizona, their certain real estate mort-

gage bearing date the 1st day of February, 1928, which said mortgage is in words and figures as follows, to wit: [388]

"MORTGAGE.

"KNOW ALL MEN, That W. J. Bachowetz and Rose Bachowetz, his wife, of Maricopa County, Arizona, hereinafter referred to as the Mortgagors, in consideration of Four Thousand Seven Hundred and No/100 Dollars, in hand paid by J. W. Sullivan hereinafter referred to as the Mortgagee the receipt of which is hereby acknowledged, do hereby grant, bargain, sell and convey to the Mortgagee his heirs and assigns forever, the following real estate, lying and being in the County of Maricopa, State of Arizona, known and described as

"Lot 2, Block 6, East Evergreen, an Addition to the City of Phoenix, according to the plat of record in the office of the County Recorder of Maricopa County, Arizona, in Block 3 of Maps, page 55 thereof;

"TO HAVE AND TO HOLD the above described premises together with all the privileges and appurtenances thereunto belonging unto the mortgagee, his heirs, executors, administrators or assigns forever. And the mortgagors hereby covenant that they are well and truly seized of a good and perfect title to the premises above conveyed in the law, in fee simple, and have good right and lawful authority to convey the same, and that the title so conveyed is clear, free and unincumbered and that they will forever warrant and defend the

same to the mortgagee against all claims whatsoever.

"PROVIDED ALWAYS, and these presents are upon this express condition, that if the mortgagors shall pay to the mortgagee the just and full sum of Four Thousand Seven Hundred and No/100 Dollars, with interest thereon, according to the terms and conditions of one certain promissory note bearing even date herewith, due on or before November 1st, 1928, with interest thereon at 7% per annum, payable at maturity, and made and executed by Mortgagors herein and payable to the order of the mortgagee and shall moreover pay to the proper officers all taxes and assessments, general or special, which shall be levied or assessed upon said real estate on or before the date when such taxes or assessments shall have become delinquent, and insure and keep insured the buildings on said premises against loss or damage by fire, in the sum of ..... Dollars in insurance companies to be selected by the mortgagee, and the policies of insurance assigned or made payable to the said mortgagee, as ..... interests may appear, until payment in full of said promissory note, and interest thereon, then these presents shall be null and void. In case of the non-payment of any sum of money (either principal, interest or taxes) at the time or times when the same shall become due, or failure to insure said buildings according to the conditions of these presents, then the mortgagee may pay same and add the amount so paid to the sum secured, by this mortgage and in any such case, or in case of the failure on the part of the mortgagors to keep or

perform any other agreement, stipulation or condition herein contained or contained in the note above described, the whole amount of the said principal sum shall at the option of the mortgagee be deemed to have become due, and the same with interest thereon at the rate of ten (10) per cent per annum from the date of exercising said option, shall thereupon be collectible in a suit at law, or by foreclosure of this mortgage, in the same manner as if the whole of said principal sum had been made payable at the time when any such failure shall occur as aforesaid.

"And the mortgagors do further covenant and agree to keep the mortgaged property in good condition and not to permit any [389] waste or deterioration thereof, and in case complaint is filed for a foreclosure of this mortgage, the mortgagee shall be entitled to the appointment of a Receiver without bond to take possession of the mortgaged premises and collect the rents and profits thereof pending foreclosure proceedings and up to the time of redemption or issuance of sheriff's deed, and in case of such foreclosure the mortgagors will pay to the mortgagee in addition to the taxable costs of the foreclosure suit ten per cent (10%) as attorney's fees, on the amount found due, together with a reasonable fee for title search made in preparation and conduct of such suit, which shall be a lien on said premises and secured by this mortgage, and in case of settlement after suit is brought, but before trial, the mortgagors agree to pay one-half of the above attorney's fees as well as all pay-

ments that the mortgagee may be obliged to make for his security.

"The covenants herein contained shall extend to and be binding upon the heirs, executors, administrators, successors and assigns of the respective parties hereto.

"IN WITNESS WHEREOF, the mortgagors have hereunto set their hands this 1st day of February, A. D. 1928.

"W. J. BACHOWETZ. (Seal)
"ROSE BACHOWETZ. (Seal)
"By W. J. BACHOWETZ, (Seal)
"Attorney-in-fact. (Seal)

"State of Arizona,
"County of Maricopa,—ss.

"Before me, J. J. Barkley, a Notary Public in and for the County of Maricopa, State of Arizona, on this day personally appeared W. J. Bachowetz known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

"Given under my hand and seal of office this 1st day of February, A. D. 1928.

"[Seal] J. J. BARKLEY.

"My commission expires July 14, 1930.

"State of Arizona,
"County of Maricopa,—ss.

"Before me, J. J. Barkley, a Notary Public in and for said County, State of Arizona, on this day personally appeared W. J. Bachowetz known

to me to be the person whose name is subscribed to the foregoing instrument as the Attorney in Fact of Rose Bachowetz, and acknowledged to me that he subscribed the name of the said Rose Bachowetz thereto as principal and his own name of Attorney in Fact, and as such Attorney in Fact he executed said instrument for the purpose and consideration therein expressed.

"Witness my hand and seal of office this 1st day of February, A. D. 1928.

"[Seal] J. J. BARKLEY,
"Notary Public.

"My commission expires July 14, 1930." [390]

and which said mortgage was duly acknowledged and certified so as to entitle it to be recorded and the same was on, to wit, the 4th day of February, 1928, at 9:00 o'clock A. M. of said day duly recorded in the County Recorder's office of Maricopa County, Arizona, in Book 209 of Mortgages, at pages 255–256 thereof.

IV.

That thereafter, to wit, and on or about the 8th day of October, 1929, said J. W. Sullivan for value received did sell, assign and transfer said note mentioned in paragraph II of this amended complaint, and *sis* assign the mortgage described in paragraph III of this amended complaint, to the plaintiffs, Sidney P. Osborn and Neri Osborn, Jr., which said assignment of mortgage was duly acknowledged and certified so as to entitle it to be recorded, and the same was on, to wit, the 9th day of October, 1929, at 11:27 o'clock A. M. of said day,

duly recorded in the County Recorder's Office of Maricopa County, Arizona, in Book 16, of Assignments, at page 175 thereof; that plaintiffs are now the owners and holders of the note and mortgage hereinbefore in this amended complaint described.

V.

That there was on the 1st day of November, 1928, due and owning to the plaintiffs from the defendants, W. J. Bachowetz and Rose Backowetz, his wife, the sum of Four Thousand Nine Hundred Forty-nine and 69/100 ($4,949.69) Dollars, being principal and interest on said promissory note and mortgage according to the terms and conditions thereof to said November 1, 1928, and that no part of said sum has been paid by the said defendants, W. J. Backowetz and Rose Bachowetz, his wife, nor by any one else, though often demanded.

VI.

That by the terms of said note and mortgage it was further agreed and provided in substance that in the case of the non-payment of any sum of money, either of principal, interest [391] or taxes, at the time or times when the same shall become due that the mortgagee may pay same and add the amount so paid to the sum secured by the mortgage herein described, and that the same shall bear interest in accordance with the terms of said mortgage; and it is further provided in said mortgage that the mortgagors will pay all costs including the attorney's fees therein provided *form* enforcing the provisions of and foreclosing said mortgage, and

the reasonable fees and costs for a title search, and all other costs, expenses, and taxes that might be necessary to be paid by the mortgagee to protect his security.

VII.

That the plaintiffs were compelled to pay city, county and state taxes and assessments on the property herein described, in the sum of Three Hundred Sixty-three and 39/100 ($363.39) Dollars, in order to protect their security; that on the 11th day of October, 1929, plaintiffs in order to protect their security were also required to pay to the Superintendent of Streets of the City of Phoenix the sum of Three Hundred Sixty-four and 94/100 ($364.94) Dollars in order to redeem the property, herein described and described in said mortgage, from a sale made of said property by the Superintendent of Streets of the City of Phoenix on the 31st day of August, 1929; that the plaintiffs were compelled to incur an expense of Twenty ($20.00) Dollars for a title search to the above described premises, for the purpose of foreclosure, which defendants have failed to pay; that the plaintiffs have been compelled to employ attorneys to collect the note herein set forth, and to foreclose the mortgage herein described, and have agreed to pay said attorneys a sum equal to ten per cent of the amount found due under said mortgage as provided in said note and mortgage, which sum amounts to Six Hundred ($600.00) Dollars; that there is now due to [392] these plaintiffs upon said note and mortgage as of November 1, 1928, the following sums, principal

and interest, on said promissory note and mortgage to November 1, 1928, Four Thousand Nine Hundred Forty-nine and 69/100 ($4,949.69) Dollars; city, county and state taxes and assessments paid by plaintiffs, Three Hundred Sixty-three and 39/100 ($363.39) Dollars; amount paid Superintendent of Streets to redeem said property from sale Three Hundred Sixty-four and 94/100 ($364.94) Dollars; title search of said property Twenty ($20.00) Dollars; attorney's fees Six Hundred ($600.00) Dollars.

VIII.

That the record title to said premises as of the 20th day of November, 1929, appears in Clinton Campbell, Trustee, husband of Lena Campbell.

IX.

That the defendants, W. J. Bachowetz and Rose Bachowetz, his wife, Victor F. Rodriquez, E. H. Wheat, Walter Dubree, Clinton Campbell and Lena Campbell, his wife, O. M. Moore, H. L. Christian, and A. J. Christian, C. P. Munger Rock Company, Arizona Sash-Door & Glass Company, Allison Steel Manufacturing Company, Phoenix Builders' Supply Company, Luther Hill, James Boyd; D. L. Francis, Lyon Francis and Leo Francis, doing business under the name and style of Phoenix Plumbing and Heating Company; Walter J. Thalheimer, Receiver for Phoenix Plumbing and Heating Company, have or claim to have some interest in the property described herein and described in said mortgage herein set forth as judgment creditors,

lienholders, encumbrancers, or otherwise, but said claim or claims is and are subsequent and inferior to the mortgage herein described and sought to be foreclosed by these plaintiffs.

WHEREFORE, plaintiffs pray judgment against W. J. Bachowetz and Rose Bachowetz, his wife: [393]

1. For the sum of Four Thousand Nine Hundred Forty-nine and 69/100 ($4,949.69) Dollars, together with interest thereon at the rate of ten (10%) per cent per annum as provided in said promissory note from November 1, 1928, until paid, together with the further sum of Twenty ($20.00) Dollars on account of title search made for the purpose of foreclosing this mortgage with interest thereon at the rate of six (6%) per cent per annum from date of judgment until paid; together with the further sum of Six Hundred ($600.00) Dollars, attorney's fees with interest thereon at the rate of six (6%) per cent per annum from date of Judgment until paid; together with a further sum sufficient to pay all taxes and assessments due, or paid, with interest, penalties and costs; together with the further sum of Three Hundred Sixty-four and 94/100 ($364.94) Dollars, paid by plaintiffs to redeem said property from a sale made by the Superintendent of Streets of the City of Phoenix, with interest thereon at the rate of six (6%) per cent per annum from Judgment until paid.

2. For plaintiffs' costs and disbursements herein.

3. That the usual decree may be made for the sale of said premises by the sheriff of Maricopa

County, Arizona, according to law, and according to the practice of this court; and that the proceeds of said sale may be applied to the payment of the amounts due to plaintiff as aforesaid; and that the defendants, W. J. Bachowetz and Rose Bachowetz, his wife, Victor F. Rodriquez, E. H. Wheat, Walter Dubree, Clinton Campbell and Lena Campbell, his wife, O. M. Moore, H. L. Christian and A. J. Christian, C. P. Munger Rock Company, Arizona Sash-Door & Glass Company, Allison Steel Manufacturing Company, Phoenix Builders' Supply Company, Luther Hill, James Boyd; D. L. Francis, Lyon Francis and Leo Francis, doing business under the name and style of Phoenix Plumbing and Heating Company; Walter J. Thalheimer, [394] Receiver for Phoenix Plumbing and Heating Company, and all persons claiming by, through or under them, or either of them, subsequent to the execution of said mortgage upon said premises either as purchasers, judgment creditors, lien holders or otherwise, may be barred and forever foreclosed of all rights, claims or equity of redemption in the said premises and every part and parcel thereof.

4. That the plaintiffs or any other party to this suit may become a purchaser at said sale, and that upon the expiration of the time allowed by law for the redemption of the premises from such sale the sheriff execute a deed to the purchaser and that the purchaser be let into the possession of the said premises upon the production of the sheriff's deed therefor;

5. That if there is any deficiency after the sale

(Testimony of Jerrie Lee.)

of said property that the plaintiff have execution against the defendants, W. J. Bachowetz and Rose Bachowetz, his wife, for same.

6. That the plaintiffs may have such other and further relief in the premises as to this Court may seem meet and equitable; and that plaintiffs have general relief.

_____.

H. S. McCLUSKEY,
Attorney for Plaintiffs.

BAKER & WHITNEY,
Of Counsel. [395]

TESTIMONY OF JERRIE LEE, FOR PETITIONING CREDITORS (RECALLED).

(Examination by Miss BIRDSALL.)

There is a loan account to Marie & Joe Francis, referring to (Petitioners' Exhibit No. 1 for Identification, No. 7 in evidence) it is marked loan account, Marie and Joe Francis, dated from May 1 to May 16 and reads as follows:

May	1 rebate check #2538	$ 150.00
May	2 rebate check #2551	80.00
May	4 rebate check #2557	20.00
May	6 rebate check #2590	30.00
May	16 check retd.	1087.32
June	5, cash	160.00

Credit side

Loan April 30	1087.32
Loan May 10	500.00

(Testimony of Jerrie Lee.)

Q. Have you any record of the cancelled checks or stubs giving any further light on that account?

A. I think there are some in those records introduced this morning.

Q. Can you find them right now?

A. I think so. (Witness examines book.)

A. Check No. 2538, amount $150, May 1, 1929, payable to Marie Francis, repayment of loan. No. 2551, dated May 3, amount $80, payable to Joe Francis, repayment of loan in the name of Marie Francis. No. 2557, dated May 4, 1929, $20, payable to Joe Francis, repayment of loan in name of Marie Francis; Check No. 2590, dated May 6, 1929, $30 payable to Joe Francis repayment of loan to Marie Francis; there is no record of check returned or for cash payments, unless it is in the cash book.

Q. Referring to Petitioners' Exhibit No. 6 for Identification, No. 7 in evidence, will you look at that?

A. On page 6, line 20, on the credit side. The bookkeeper has taken credit for check returned for insufficient funds, [396] $1,087.32, made by Joe Francis; page 17, line 23, same book, June 5, Joe Francis paid to D. Francis, cash, $160 charged to Joe Francis loan account; that is all the record I have.

Q. Is there any record on the cash book showing whether that went through the bank book? The $500 loan and the $500 payment?

A. Page 4, line 29, same book, there is an entry. Received from Joe Francis, $500 and entered in the general ledger loan account.

(Testimony of Jerrie Lee.)

Q. I think you testified the other day in regard to the check for $1,100 in evidence, Petitioners' Exhibit No. 11, payable to M. Carom & Sons, dated March 15, 1929, that there is nowhere in the books of the company a record of that account or that check other than the check stub and the check itself; is that correct? A. Yes, that is correct.

Q. There is no record even on the cash book as I take it, as it was prior to the date of the cash book No. 6 for identification, No. 7 in evidence?

A. There is nothing on there; that is prior to that date.

Q. Referring to the books of the Phoenix Plumbing & Heating Company which have been introduced in evidence, can you find anywhere an account of Paul Gehres with the Phoenix Plumbing & Heating Company?

(Witness examines book.)

A. The only account I have located is in Petitioners' Exhibit No. 2 for Identification here, No. 7 in Evidence, accounts payable. There is an account of Paul E. Gehres, employee, which shows that various charges have been made, apparently for goods he had been buying through the company in the amount of $85.53, and the amount had been paid in three different items, so the account is in balance. [397]

Q. Can you tell the year? A. No.

Q. Is there any indication by check number which would indicate the year?

A. We have no cash book with those numbers, but

(Testimony of Jerrie Lee.)

the notation "C. B." would indicate that it was a cash book entry.

Q. Is there any other account with Paul Gehres, so far as the books are concerned?

A. No. The only information we could get would be the cancelled checks or check stubs; I haven't looked at the time book.

Q. Will you examine Petitioner's Exhibit No. 4, which is the time book, and see if Mr. Gehres' salary was carried on that?

(Witness examines Petitioners' Exhibit No. 4 for Identification, No. 7 in Evidence.) [398]

A. Here is one,—January 12, 1929.

Q. Indicating the date they started, and the amount?

A. That was for the period of January 1 to 15th at $175 a month, or $87.50.

Q. How long did those payments at that rate continue?

A. The next is February 2, 1929, paying for the period January 15th to February 1st, same rate; next, February 1st to 16th, same rate, $77.50; next is March 2nd; the last item appearing on the pay-roll was up to May 15th, 1929, at the same rate.

Q. From your examination of the books did you find any record of the stubs showing any other payment to Mr. *B*ehres?

A. The only one I recall was a $1,200 item marked repayment of loan.

Q. Can you find that on the check stubs?

A. Yes,—Check No. 1925, November 20, 1928, for

(Testimony of Jerrie Lee.)

the sum of $1,200, repayment of loan to fix overdraft, payable to P. E. Gehres.

Q. You have no record on the books anywhere of loan having been made by Gehres to the Phoenix Plumbing & Heating Company? A. No.

I found no record of Calloway loan or payment, nor of Westward Ho material. (Referring to Pet. Ex. 5 for Identification, No. 7 in Evidence.) The initial capital of company is entry of $2,100 in cash book, October 1, 1927. October 4, 1927, Remsbottom was paid $1,600 in two payments of $100 and $1,500. There is no record of any balance shown due Remsbottom. There is no record of any account due Thomas at any time subsequent to start of business. If Joe Thomas put in money at start of business it would probably show in cash book. There is no record prior to explosion of a Thomas account. Prior to explosion the only record is a check of $712.00 referred to above. July 30, 1928, [399] which is Pet. Ex. No. 19 in evidence.

The bank book (Petitioners' Exhibit No. 14 in Evidence) shows deposit $2,150, September 26, 1927, October 22, note for $200 was deposited. The $200 note appears on page 22 in cash book. (Petitioners' Exhibit No. 5 for Identification, No. 7 in Evidence.) The bank is debited with it and credited under "personal account."

Q. From your examination of the books and records of the Phoenix Plumbing & Heating Company, assuming the original capital was $2,100, or $2,150, as shown by the bank books and the original cash book, can you testify or does it show from the books

(Testimony of Jerrie Lee.)

where that capital has been increased by any other funds other than profits?

A. The records do not disclose where any other funds came from.

Q. Did they disclose any other funds coming in there to increase the capital account? A. No.

Q. Then can you from your examination of the books and records testify as to the capital having been increased by any profits?

A. They are not kept in a manner to reflect a profit and loss account.

Q. Can you take any of the records of the company and show a contract or an item of any sort upon which the Phoenix Plumbing & Heating Company has made a profit as shown by the books?

A. Not as shown by the books.

Referring to Pet. Ex. 3 for Identification, No. 7 in Evidence, Lincoln Mortgage Company transaction, there are no notations of assignments to anyone. [400]

Q. Will you refer to the records of the Phoenix Plumbing & Heating Company subsequent to April 22, 1929, the date of the explosion, and see if you can find a payment to the Plumbing Company of amounts from the Lincoln Mortgage Company.

A. You mean from the contracts receivable ledger or the other cash book?

Q. Are they shown on the contracts receivable ledger? A. There are some.

Q. I am referring particularly to the payment in the early part of June, 1929.

A. That does not appear; that appears in the

(Testimony of Jerrie Lee.)

cash book. Here is Petitioners' Exhibit No. 6 for Identification, No. 7 in Evidence, page 19, line 10, $13,000, in contracts receivable, and it is charged to accounts payable, Standard Sanitary Manufacturing Company.

Q. What date is that? A. June 10, 1929.

Q. Is there any other record?

A. On the same page 19, line 9, Lincoln Mortgage Company, $1,000 credited to contracts receivable, debited to bank.

Referring to contracts receivable account (Petitioners' Exhibit No. 3 for Identification, No. 7 in Evidence) on Phoenix Junior College job, the book shows notation as follows: "Balance assigned to Standard Sanitary Manufacturing Company May 7, 1929," and the same book shows the Library Building job assigned to the same company May 7, 1929, and also the same notation of assignment on Central Heating Plant. There was no notation of assignment on E. J. Bennett job, Harry Tritle job, O. P. Johnson job, Schwentker job, Marana Teacherage Building job, Campbell job, Barnes job or two Bell jobs. [401]

Payments to the Crane Company in four months prior to August 17, 1929, are as follows: (Reading from Petitioners' Exhibit No. 1 for Identification, No. 7 in Evidence.) Check No. 2608 $1,000 May 8, 1929. Petitioners' Exhibit No. 6 for Identification, No. 7 in Evidence, shows check 2869 for $500 paid to Crane Company June 21, 1929. If other payments were made to Crane Co. in that period they are not posted in accounts payable ledger. Page 21

(Testimony of Jerrie Lee.)

of the same book shows five payments to Standard Sanitary Company during the four months ending August 17, 1929, but the Standard Sanitary Company statement of which I have a copy in my hand reads for the same period as follows:

April 30, 1929, check #2536	$	2500.00
May 3, 1929, check #2556		508.94
May 14, 1929, check #2607		695.00
May 4, 1929, check #2605		1448.00
June 11, payment by Lincoln Mtg. Co.		13000.00
June 7, check No.		200.00
June 6, check No.		11.72
July 29, paid by Brown on Asyl. job		2949.00
July 30, 1929		933.50

I got the above from three different records. This comprises all payments made to Standard Sanitary Manufacturing Company on account of the Phoenix Plumbing & Heating Company during that period so far as I am able to ascertain.

Q. Can you refer to the books and see if they reveal a time during April or May, 1929, during which weekly payments were made to the Standard Sanitary Manufacturing Company by the Phoenix Plumbing & Heating Company?

A. The only information we have is the stubs of the checks issued for three different weeks.

Q. Will you refer to them please, and read them into the record?

A. The first check is No. 2494, shown in Exhibit No. 19 in Evidence, dated April 26, 1929, for amount of $947.97, payable to Standard Sanitary Manufacturing Company for purchases for week ending

(Testimony of Jerrie Lee.)

April 20th; check No. 2556, May 3, 1929, $508.94 [402] payable to Standard Sanitary Manufacturing Company, purchases for week ending April 27th; Check No. 2605, dated May 8, 1929, for $1-448.00, payable to Standard Sanitary Manufacturing Company, purchases for week ending May 4th.

Q. These were all in 1929?

A. Yes, on the dates given.

Q. Will you testify from your examination of the books and records of the Phoenix Plumbing & Heating Company of payments made to Fred Noll, of the Fred Noll Tire Service, prior to August 17, 1929, and subsequent to June 1st, 1929.

A. Referring to No. 1 for Identification, No. 7 in Evidence, shows Fred Noll Tire Service Station having a credit of $24.75 in April, and on May 31, $44.50; the total, $69.25.

Q. I said subsequent to June 1st.

A. I will have to go over these stubs. First payment in June, No. 2887, June 24, $9.90; No. 2895, June 27, $28.25; No. 2919, July 1st, $10.85; No. 2946, July 12, $16.25; referring to the cash book, No. 6 for Identification, No. 7 in Evidence, page 26, line 2, July 15, $4.31; total balance of $69.56, for the period between June 1st and August 17, 1929.

The following receipted bill and statements introduced as Petitioners' Exhibit No. 24 in evidence. [403]

PETITIONERS' EXHIBIT No. 24.
In Evidence.

STATEMENT.
FRED NOLL TIRE SERVICE.
540 W. Van Buren,
Phoenix, Ariz.

To D. Francis
separate from
Plumbing bill during May

Date	Article	Debits	Credits	Balance
5/ 9	5 gl gs	1.00		
12	tu repair	.50		
13	9½ gall g	1.90		
14	12 gall g	2.40		
16	1½ gall g	.30		
16	2 q oil	.70		
27	5 gal gas	1.00		
6/ 3	5 gal gas 7 qt oil	3.45		
9	1 q oil	.25		
			Pd.	
6	9 gal gas	1.80	7–12–29	
24	5¾ gal gas	1.15		
24	9 gal gas	1.80		
		16.25		

All the above is *use* out figur*e*ing job.

D. FRANCIS.
B.

Attached to the above were small debit slips which were itemized as follows:

5/ 9/29 Phx. Plumb 1 qt. oil..... .25
Marie Francis
5/14 Phx. Plumb 10 gal gas 2.40
Tucson D. Francis
Phoenix Plumb Co. 5–13–29 9½@20 1.90
Yuma D. Francis
5/12/29 Phoenix Plumb 1 tire rep. chg..... .50
D. Francis.
5/ 9/29 Phoenix Plumbing Co. 5 gal. @ 20 ..1.00
D. Francis.
5/10/29 Phoenix Plumb 1½ gal Gas @ 20 ... .30
D. Francis.
5/10/29 Phoenix Plumb Co. 2 qts. oil @ 35... .70
D. Francis M. F.
May 3 1929 Phx Plumb Co. 5 gal gas 1.00
7 qt. oil @ 35.....2.45
Safford D. Francis Ck. No.
30448
5/27/29 Phx. Plumbing 5 gal Gas 1.00
Glendale D. Francis
5/ 6/29 Phoenix Plumb 9 gallon 1.80
Safford D. Francis
5/24 Phoenix Plumb. Co. 9 gal. gas @ 20..1.80
Prescott D. Francis
5/24/29 Phx. Plumb. Co. 2¾ gal. Gs @ 20...1.15
Desert Hotel D. Francis [404]

B.–522. Petitioners' Exhibit No. 16. For Identification.

There is no record of a transaction with one Joy in any of the books. There is nothing shown under accounts payable or any loan account, and in my examination I found no invoice covering such a transaction, and there was no inventory of merchandise

(Testimony of Jerrie Lee.)

account kept on the books. There would be no way of tracing such a transaction on the books.

The liabilities of the Phoenix Plumbing & Heating Company on April 30, 1929, as taken from the books amount to $69,240.35, itemized as follows:

Contracts Payable William Remsbottom	$ 92.50
Notes Payable Commercial National Bank	6000.00
April 30th cash advanced by Joe Thomas	1087.82
Accounts payable	62059.73
Total Liabilities	$69240.35

The assets taken from the books and statements furnished to the Bank, memoranda and statements in the files show on April 30th, 1929, the following:

Accounts receivable	$ 5396.86
Cash on hand	264.45
Inventory of March, estimate (merchandise)	5000.00
Auto trucks	400.00
Furniture & Fix.	499.75
Shop tools & Equip.	365.00
Contracts Receivable as listed on books	72338.30

Q. That includes the contracts completed and uncompleted?

A. That is every contract, regardless of whether never completed or never started but set up in the books; in some instances they have been paid and not credited on the books; this is a part that was estimated. There were a certain number of jobs not completed as of April 30th. This information I obtained from Mr. Gehres and Leo Francis and same has been testified to since by Mr. Fryberger,

(Testimony of Jerrie Lee.)

but I never talked to him; I listed the asylum job as not completed, $4,021.25, as it has just been started; the city hall job was not completed, $8,707.-85; the E. J. Bennitt [405] job, not completed, $1,968.86; the F. B. Schwentker job, not completed, $2,634.00; the Phoenix Union High School job, $4,-136.50; the library and class-room job, $9,410.12; the Harry Tritle job, $1,554.75; the Yuma High School job $5,717.00; then there is an item appearing on the books, Bachowetz apartments. I was told by Leo Francis that it had no value and it was in litigation and that therefore he did not feel that it was an asset, so I eliminated $3,700 for that. In checking the record I found there was a lien and first mortgage to J. M. Sullivan due November 1, 1928. I listed $45,189.83 as assets for this reason. If these books had been properly set up there would have been a liability side on the ledger and we could have known how much work was completed and how much there was to be completed; the total of jobs appearing to have been completed and on which money was due and would be assets was $27,-148.47.

Q. Then what would the total assets have been eliminating uncompleted contracts?

A. $39,074.53.

Q. And total liabilities? A. $69,240.35.

All these liabilities of $69,240.35 were open accounts. There was an item there of debts to the following companies: Standard Sanitary Manufacturing Company, Crane Company, Union Oil Company, Pratt-Gilbert Company, Momsen-Dunne-

(Testimony of Jerrie Lee.)

gan-Ryan Company, Fred Noll Tire Service; all these appear as unsecured creditors. No new work and no profit appear between April 21st and April 30th, 1929, on the books and records of the Company. There was no record kept reflecting profit and loss.

Q. From your examination of the books and records of that company, you compiled a statement of the financial condition [406] of the company as of August 17, 1929? A. Yes.

Q. Will you state what were the debts of the Phoenix Plumbing & Heating Company on August 17, 1929? A. Liabilities?

Q. Yes.

A. Accounts payable, as shown by the records of the company, $64,980.47; notes payable to the Commercial National Bank, $6,100; a total of $71,-080.47.

Q. Will you state what property and assets the Phoenix Plumbing & Heating Company had as of that date, from your examination?

A. Cash in bank, as shown by the records, $20.97; cash on hand, $5.42; accounts receivable, $5,859.70; merchandise inventory, estimated, $3,000; furniture and fictures, $499.75; auto trucks, $400; shop tools and equipment, $365.00; contracts receivable, including both finished and unfinished jobs, $49,073.66, from which I have eliminated the Bachowetz Apartments, $3,700, for the reason as stated before; City Hall job, $8,707.85; Schwentker job, not complete, $1,973.50; Phoenix Union High School, not com-

(Testimony of Jerrie Lee.)

plete, $3,342.70; Phoenix Junior College, $2,106.00; High School library, $9,410.12; Yuma High School, $2,719.92; the total was $31,960.09, leaving a total of assets of contracts receivable of $17,113.57.

Q. What were the total assets of the company then as of August 17, 1929? A. $27,364.41.

Q. And the total liabilities? A. $71,080.47.

Q. From your examination of the books and records can you find anything in the books or records that you have [407] examined that would indicate any change for the better in the financial condition of the Phoenix Plumbing & Heating Company as you have testified same was shown on April 30, 1929—subsequent to that date and up to August 17, 1929?

A. There is nothing to indicate that there has been any betterment of conditions financially between April 30th and August 17th, 1929; no new capital has been put into the business.

(Statements of April 30 and August 17, Petitioners' Exhibit No. 25 in Evidence.) [408]

B.–522.

PETITIONERS' EXHIBIT No. 25.

In Evidence.

12–3–29.

Letter Head.

THE SOUTHWEST AUDIT CO.

PHOENIX PLUMBING & HEATING COMPANY.

FINANCIAL STATEMENT.

August 17, 1929.

ASSETS:		
Cash in Bank	$	20.97
Cash on hand		5.42
Accounts Receivable		5,959.70
Contracts Receivable		17,113.57
Mdse—Inventory—Estimated		3,000.00
Furniture & Fixtures		499.75
Auto Trucks		400.00
Shop Tools & Equipment		365.00
Deficit		43,716.06
TOTAL		$71,080.47
LIABILITIES:		
Accounts Payable		$64,980.47
Notes Payable—Commercial Nat'l. Bank		6,100.00
TOTAL		$71,080.47

[409]

B.–522.

PETITIONERS' EXHIBIT No. 25.

In Evidence.

12–3–29.

Letter Head.

THE SOUTHWEST AUDIT CO.

PHOENIX PLUMBING & HEATING COMPANY.

FINANCIAL STATEMENT.

April 30, 1929.

ASSETS:

Cash on Hand and in Bank	$ 264.45
Accounts Receivable	5,396.86
Contracts Receivable	27,148.47
Mdse.—Inventory—Estimated	5,000.00
Furniture & Fixtures	499.75
Auto Trucks	400.00
Shop Tools & Equipment	365.00
Deficit	30,165.82
TOTAL	$69,240.35

LIABILITIES:

Accounts Payable	$62,059.73
Contract Payable—Wm. Remsbottom	92.80
Notes Payable—Commercial Nat'l. Bank	6,000.00
Cash Advanced by Joe Thomas	1,087.82
TOTAL	$69,240.35

[410]

(Testimony of Jerrie Lee.)

(Examination by F. J. DUFFY.)

The books we used in arriving at the audit were probably more than we needed. They were the accounts payable ledger, contracts receivable and accounts receivable, cash book, check book, mutilated checks and stubs. The books were not the accepted method even in smallest kind of books. Auditors often work on books different than accepted method. Accountants are not needed on accepted method. Many firms do not keep complete sets. Where set of books contains accounts receivable, accounts payable, cash book and check stubs, we can get a pretty good idea of the business, —that is if they are not destroyed.

Q. Now, as a matter of fact in this particular case on the books that were available and are here present you have been able to trace out any given set of payments and arrive at approximately the true situation in regard to any account,—isn't that true?

A. From the stubs and the checks we have been able to trace out most of the payments but my efforts in the matter of the Phoenix Plumbing & Heating Company have been confined to one big account, as you well know, and fortunately even though the checks were mutilated, they were not completely destroyed, and through the assistance of your clients we were able to piece together information enough to get the true facts as concerned your client.

Q. Isn't it a fact that without the assistance of

(Testimony of Jerrie Lee.)

my client you were able to trace other payments on one contract through last winter and last fall to September, 1928, and show payments all through, isn't that true?

A. I don't know which one you mean, not from the records of these books. It was through the records of the city [411] hall, and I had to go out and get my information; it was not a bookkeeping job.

Q. Didn't your audit on that show payments from the books? A. No, sir.

Q. Payment of $8,000 that had gone from the Phoenix Plumbing & Heating Company to the Standard Sanitary? A. The books showed some.

Q. On your audit there you pointed out definitely certain payments through September, October, and November of last year to the Standard Sanitary Company?

A. I traced them out of the office; it was not from the records; we had at our disposal other records.

Q. But you did verify them from the check stubs here, didn't you?

A. Yes, and records in the city hall.

Q. So that you were able in this particular case and with this set of books to find out approximately how much was due and how was paid the Standard Sanitary Company on account of the city hall job?

A. Yes, and a big aid in discovering this was the architect's office, which we did not touch in these other jobs.

(Testimony of Jerrie Lee.)

Q. But it was recognized by the parties in interest and by the Standard Sanitary Company by that time that you had dug out facts sufficient to make good evidence in court to establish the true status of this matter, through those books?

A. You mean without any assistance, outside assistance? Like an architect, the bank or other sources of information?

Q. It was recognized by the Standard Sanitary Manufacturing [412] Company and the Southern Surety Company that you had dug out from the books of the Phoenix Plumbing & Heating Company sufficient facts to make evidence in court as to the standing of that account?

A. You mean from the records of the Phoenix Plumbing & Heating Company books?

Q. I mean from the books of the Phoenix Plumbing & Heating Company.

A. I did not prepare the statement solely from the Phoenix Plumbing & Heating Company books, therefore I could not answer yes or no. I prepared it from other avenues of information,—your own client, the bank, and any place I could get information.

Q. When you started on this job you went to the books of the Phoenix Plumbing & Heating Company?

A. When I started I took the statement of the Standard Sanitary Manufacturing Company and worked on it for ten days without reference to any

(Testimony of Jerrie Lee.)

books; just the Plumbing Company's statement alone was what we had—

Q. You mean the Standard Sanitary Company?

A. Yes.

Q. As a matter of fact, the last thing you got was that statement of the Standard Sanitary Company.

A. I beg your pardon. I got that to check your first statement made months beforehand,—how you were going to bill them now,—as to how you billed them originally.

Q. But you did get the first statement you worked on among the papers of the Phoenix Plumbing & Heating Company? A. Yes.

Q. And it was part of their records over there?

A. Yes. [413]

Q. It was statements rendered by the Standard Sanitary Manufacturing Company to them, wasn't it? A. Yes.

Q. Then you went to the books of the Phoenix Plumbing & Heating Company, didn't you?

A. No. Then I went to mutilated checks and check stubs. Very little reference was ever made to those books, other than the cash book, the deposit slips, the mutilated checks and check stubs.

Q. When you went in on the Southern Surety Company job you went in to find out what information you could and how much money had been paid on the city hall job, didn't you?

A. That is true, yes.

Q. And you wanted to do that as quickly as possible, didn't you? A. Certainly.

(Testimony of Jerrie Lee.)

Q. And you used a portion of the records of the Phoenix Plumbing & Heating Company, and some of the records of the Standard Sanitary Mfg. Company and some of the records of the city hall, isn't that true?

A. I used all of the records available of the Phoenix Plumbing Company, and those that were not available, I looked for outside information from the Standard Sanitary Company.

Q. But with the material on hand you did arrive at a pretty nearly correct statement of the situation of the Phoenix city hall job, so far as the Phoenix Plumbing & Heating Company was concerned?

A. With one exception,—that was the verification at the architect's office; with those two sources I could have arrived at a definite conclusion as to how much money [414] was paid in on the job.

Q. Isn't it true that, given the same situation you had on the Southern Surety and the city hall job,—if you had had a complete set of books of the Phoenix Plumbing & Heating Company you would have covered the same ground and checked through the same sources as you did in these?

A. Yes.

Q. There was a general ledger, and a fairly accurate set of books kept after April 22, wasn't there? A. No.

Q. What was missing?

A. There was no capital account; no merchandise account; no inventory account; no control accounts;

(Testimony of Jerrie Lee.)

nothing that would bear out the name of a general ledger in the general ledger book.

Q. But anything from April 22 to August 17th could be traced down through these books?

A. Through the checks and check stubs but they were not entirely complete.

Q. And if there had not been an explosion, and there had been a cash book and one other book missing, you would have been able to trace these other items through January and February and March, wouldn't you? A. Yes.

Q. And if the cash book and other books missing were kept in the same manner as those other books were kept, you would have been able to trace them through? A. Yes, I think so.

Q. It is true there was no cash book burned from May 24, 1928, to the date of the explosion?

A. Yes, to the best of my knowledge. [415]

Q. You saw that little part of the book burned and torn here? A. Yes.

Q. Isn't it a fact that most of the check stubs were available?

A. There were about two books missing.

Q. Two books of check stubs? A. Yes.

Q. There were available bank statements, deposits and withdrawals?

A. Not from the source of the Phoenix Plumbing & Heating Company, no.

Q. There were bank statements of deposits and withdrawals?

(Testimony of Jerrie Lee.)

A. Here is the kind we had to work with; this is the class of statement we had to work with.

(Exhibiting mutilated statement included in Petitioners' Exhibit No. 12 for Identification, No. 7 in Evidence.)

Q. Those were mutilated, weren't they?

A. Yes.

Q. Those mutilated statements that were impossible to use,—did they cover the same period as the missing check stubs?

A. I don't recall as to that.

Q. The purpose of an audit, Mr. Lee, is to find out the status of a given business?

A. Yes, that is true.

Q. And if the books of that company enable the auditor to trace down the assets and liabilities of the company so that he can get a fairly accurate statement of it, they serve their purpose, do they not? A. Yes.

Q. The question is not as to whether they kept a set of books that would enable an auditor to tell at a glance the status of a business? [416]

A. Yes, that is true.

Q. It is also true that you have books which show the accounts receivable, the accounts payable, a bank book, cash book, and check stubs, you can strike a balance as to assets and liabilities of a company? A. And a journal.

Q. What is a journal?

A. A journal is used to set up capital accounts, and those accounts that do not go through the bank

(Testimony of Jerrie Lee.)

cash or checks; to set up accounts payable and accounts receivable and an inventory account, and it is the backbone of bookkeeping in most establishments.

Q. Isn't it true that in every business if you go on the premises to make an audit, if there wasn't an inventory account you could make an inventory as it stands right there?

A. Yes, that is true; you could take a physical inventory.

Q. And in this case, even if there was no journal, the material the company owned was there, the furniture and fixtures was there?

A. That is true.

Q. What other accounts go into the journal?

A. All accounts affecting the general ledger are journalized.

Q. The journal is a recapitulation of the whole thing isn't it? A. No, sir. [417]

Q. Is there any book here that has any of the information that is ordinarily found in a journal?

A. The cash book has information that would be in a journal, in what we call a cash journal and could be used as a combination cash book and journal, but this book hasn't made that provision.

Q. But it does reflect cash received.

A. For a certain period.

Q. It has accounts receivable set up?

A. As to the accuracy of that I cannot say as there is no control account and there is no way to determine what should have been set up as accounts receivable.

(Testimony of Jerrie Lee.)

Q. And they have accounts payable?

A. Yes. [418]

Q. And they did have check stubs with some omissions? A. Yes.

Q. They had a bank book? A. Yes.

Q. They had a cash book.

A. For a period they had a cash book.

Q. And one cash book was missing?

A. I don't know how many were missing; there is a gap between that one and this one.

Q. One from October, 1927, to May, 1929?

A. Yes.

Q. And another from April 22 to date?

A. Yes.

Q. But from May 24, 1928, to April 22, 1929, there was no cash book? A. That is true.

Q. Isn't it true also, Mr. Lee, that when you went in there on this audit, the Leo Francis and Mr. Fretz the bookkeeper did all they could to help you?

A. Yes.

Q. Were you able to get hold of Mr. Gehres?

A. Yes.

Q. Did he show any disposition to hide things?

A. He did the first day until it developed that a $1,200 check was discovered and it was made out in his name, and that is the last I have seen of him. We went into those accounts very thoroughly with Mr. Fretz and Leo Francis also came up and assisted us as much as possible. [419]

D. Francis check books (referring to Petitioners'

(Testimony of Jerrie Lee.)

Exhibit No. 1 for Identification, 7 in Evidence) showed on the stub where the money went for which he issued checks and was a fairly complete record. On the weeks that checks for $45 were drawn by D. Francis his name does not appear on the pay-roll but his pay was collected by his wife and Francis account of $848.32, including three or four different salary payments of $45.00 per week, but in the main consisted of other payments. The $12.00 per week paid by the bo*u*s was collected by Father. This account is clear on books. The company bought large quantities of material and paid large sums for labor. The check stubs I have testified to as missing are as follows:

A. This one begins 301 to 600; the next is 1801 to 2100; the next is 2401 to 2700, then 2700 to 3,000; 3001 to 3300; there are more missing than I thought.

The MASTER.—That would indicate four check books missing?

A. There are more than that. The one beginning 301 to 600 covers March 24, 1928, to June 19, 1928; 1801 begins Nov. 9, 1928, and ends December 11, 1928; 2401 to 2700 begins April 30, 1929, to May 18, 1929; 2704 begins May 18, 1929, and ends July 25, 1929; 3001 begins July 27, 1929, and ends No. 3052, August 15, 1929. There must be about six check stub books missing.

Q. From the period beginning April 17, 1929, to August 17, 1929, there are no stubs missing, are there? A. From here?

(Testimony of Jerrie Lee.)

Q. From the 13th of March to the 17th of August there is a continuous check stub record, isn't there? [420]

A. No. Beginning April 13, with the exception of stubs 2401, 2402, and 2403—the others appear to be here.

Q. Those numbers are 2401–2–31?

A. Yes, the book doesn't look as though they had ever been in here at all.

Q. Does it show from the books whether or not they have been torn out?

A. It doesn't look as if they had ever been in here; there is nothing to indicate they were torn out.

Q. Was the bank statement that is issued every month for the month of March, 1929, destroyed?

A. I will have to refer you to the record to tell you.

(Witness examines statement.)

A. For the period of March 1 to 14th is destroyed; period from March 14 to 26 was mutilated; March 27 to 30th was all right.

Q. There was a portion of the statements for that month that was in such shape that you get the figures off that? A. Yes, sir. [421]

The deficit of $30,165.82 on my statement of April 30, 1929, is made up of the difference I found to be liabilities and what I determined to be assets. The bill of Standard Sanitary was $41,887.64. Crane Co., $1,483.48, and a number of other accounts made up the accounts payable shown of $62,159.73. These items were for merchandise, purported to be deliv-

(Testimony of Jerrie Lee.)

ered. I could not certify it was delivered. There was not $41,000 worth of finished material on the premises of Phoenix Plumbing and Heating Company in my judgment.

Q. As a matter of fact, from the books and records of the Phoenix Plumbing & Heating Company and the accounts as stated there on the books of money received from various jobs, it showed that this material that was billed by the Standard Sanitary Mfg. Company to the Phoenix Plumbing and Heating Company had been installed in these various jobs; that is true, isn't it?

A. I don't think that is a question I could answer; I cannot say, if it was or not.

Q. Among the accounts and contracts receivable on the books of the Phoenix Plumbing & Heating Company, you found there were certain credits for money received by the Plumbing Company on these contracts, didn't you? A. Yes.

Q. These credits extended over quite a period of time, prior to April 30th, on the books, didn't they?

A. Yes.

Q. Isn't it a fact that as an auditor you knew at the time you made this statement that a great deal of the [422] material which had been delivered by the Standard Sanitary Mfg. Company to the Phoenix Plumbing & Heating Company which appeared as a charge against the Phoenix Plumbing & Heating Company was in these various contracts that appear in the accounts receivable of the company?

A. Yes. That is why I am more firmly convinced

(Testimony of Jerrie Lee.)

in eliminating it; in the city hall job there was $15,000 worth of material charged against what would have been an asset of $8,000; so it wipes it out two to one, and it is true in the high school jobs and the Yuma High School job.

Q. Even though the records showed $16,000 worth of material not paid for by the Phoenix Plumbing & Heating Company, and a credit of $8,000, did you give on this statement of the Phoenix Plumbing & Heating Company credit for an amount equal to that which was due?

A. No, and I didn't charge it up with the liability of what was due.

Q. But you did charge every item of material that was delivered by the Standard Company and not paid for as a liability, didn't you? A. Yes.

Q. And in addition to that you attempted to charge as a debit the credits that the Phoenix Plumbing Company had coming on jobs where the material you were charging as a liability had been placed on the job?

A. As of April 30 we had no way to determine, or even yet, because they had not determined whether there was to be more material than even this $16,000.

Q. You did, however, have before you those figures that on the city hall job there was a bill of $16,000 owing to the Standard Sanitary for material put into the city hall? [423] A. Yes.

Q. And you included that $16,000 in your total of $62,000 of amounts payable? A. Yes.

(Testimony of Jerrie Lee.)

Q. And then you also knew that on the city hall job there was still to be paid on the Phoenix Plumbing & Heating Company contract the sum if $8,700?

A. Yes.

Q. And you also knew from your conversations with Mr. Lescher that that job was completed except for its acceptance and the O. K. of the surety company?

A. And some minor, and perhaps major labor and material to go in there before it was accepted; the amount I cannot say.

Q. But you were told by Mr. Lescher that they did not exceed $700?

A. He said that was the approximate amount.

Q. Then you went to work to make your deficit of $30,165.82 deducting all the money due the Phoenix Plumbing & Heating Company from the city hall job?

A. I did that for the reason that the books did not reflect the liability side and it was impossible to determine what potential asset, if any, they had in this $8,700.

Q. And that is just your estimate then?

A. I told you so at the beginning.

Q. And at the time you charged them liabilities—you knew there was approximately $8,000 credit due them and yet you put that in as a liability also?

A. I have eliminated it as either liability or asset.

Q. You used it as one of the figures to make the debit on the accounts receivable which reflects this deficit. [424] You stated on April 30th all ac-

(Testimony of Jerrie Lee.)

counts receivable, $72,000, and that from that you had deducted certain amounts, giving the amounts, and the city hall job was $8,785.85? A. Yes.

Q. And yet you knew at the time that there was a clear credit to the Phoenix Plumbing & Heating Company of approximately $8,000 on that job?

A. A contract is never a credit until it is completed, which has been proven in six of these jobs.

Q. You knew that they received the money?

A. Not to my knowledge, no.

Q. You were the auditor who prepared the statement—

A. I did not attend the conference of settlement and did not know the status of that case; I don't at this minute.

Q. You knew that $8,700 was there; isn't it true that on this statement of yours here, that you have appearing as liabilities in the amount of $62,000, in accounts payable, $16,000 of material that the Standard Sanitary Mfg. Company had furnished to the Phoenix Plumbing & Heating Company, as a liability? A. Yes.

Q. And you also had charged as a liability the amount of money remaining on the city hall job?

A. I eliminated it as an asset because it was not proved an asset.

Q. But you have not deducted an equal amount from the liabilities?

A. You would not, in bookkeeping practices.

Q. But this is your own knowledge of this situa-

(Testimony of Jerrie Lee.)

tion; you know there is a credit to this amount? [425]

A. It could not be a credit until the job was completed and accepted.

Q. It was known that $8,000 was owing to them in cash?

A. Contingent upon their having completed it and its being accepted.

* * * * * * * * *

Q. Were you not told at that conference that the heating apparatus required to be installed and little odds and ends to complete it would amount to $700, leaving $8,000 clear?

A. As a matter of fact, neither Mr. Lescher or Mr. Mahoney made any direct statement to me as to what it would take to complete the job; the conversation was with Mr. Bartlett, the representative of the Southern Surety Company. I was not interested in the settlement of the affair; I was interested only in figures but not in any figures for the completion of the job; my work did not extend that far.

Q. You were just starting your audit?

A. I was just completing it; I was verifying my figures with theirs.

Q. Will you say that that statement was not made there in your presence?

A. I do not recall it.

Q. Now, Mr. Lee, you testified that on the city hall job you discovered that according to the records, on the 30th of April there was a balance due

(Testimony of Jerrie Lee.)

to be paid on that job as a credit, the sum of $8,-707.85?

A. That was what their contracts receivable record showed.

Q. On the 17th of August, 1929, you also found that there was a credit of $8,707.85 on the city hall job? A. Yes. [426]

Q. And in both of these statement you made here, one as of the 30th of April and one August 17, 1929, you take that credit from the assets of accounts receivable, do you not? A. Yes.

* * * * * * * * * * *

Q. When you deducted the $8,700 from the accounts receivable, you did not deduct a like amount from the account of the Standard Sanitary Mfg. Company charged to the Phoenix Plumbing & Heating Company, did you? A. No, sir.

Q. When you made your statement of April 30th the books there showed under contracts receivable the sum of $72,338.50? A. Yes.

Q. That was what the books of the company reflected? A. On the asset side.

Q. And when you made up this statement you deducted from that contracts receivable the sum of $45,000? A. Yes.

Q. Which constituted the amount which was to be paid on them?

A. Which represented credits claims on uncompleted jobs.

Q. And which in the ordinary course of business they would receive if they finished the work?

(Testimony of Jerrie Lee.)

A. Subject to the expenditure of labor and materials to complete.

Q. But that labor had not been incurred?

A. There might have been some of it.

Q. In the statement of April 30th you did not know whether the account of the Standard Sanitary Company, which was then some $40,000—you did not know how much of the material that that account payable of the Standard Sanitary [427] had already been received and put into those jobs?

A. As to each individual job?

Q. Yes. A. No, sir.

Q. So far as you knew, every cent of the Standard Sanitary account as it appeared on the books of the Phoenix Plumbing & Heating Company on the 30th of April, 1929, might have been for goods delivered, received and put into those jobs which they were carrying on the books as accounts receivable? I am limiting this to the liability—my question is that the whole account of the Standard Sanitary Company on the books of the company on April 30th, 1929, might have been delivered and put into those jobs covered by the accounts receivable in the assets?

A. It is probable that all of these materials went into some jobs, and the books did not reflect it. They kept no accounting system, and you couldn't possibly tell what went in and what didn't.

Q. The books showed they had been *v*illed in the sum of $41,887.64, and the item of $41,887.64 showed they had been billed for that amount? A. Yes.

Q. What I am getting at Mr. Lee is this—so far

(Testimony of Jerrie Lee.)

as you knew or could find out that $41,887.64 of material, which stood as a liability on the books of the company, might have been put into these different jobs that are called accounts receivable in their assets?

A. It is possible they could have been put in?

Q. As an auditor in examining these records you found there was $41,887.64 due the Standard Sanitary Company according to the bills entered in the books? A. Yes. [428]

* * * * * * * * * * *

Q. You found, as of April 30th, 1929, that there was $72,000 in contracts receivable on the books; you also found that in the accounts payable was the sum of some $41,000 due the Standard Sanitary; you also found there was due to Crane Co. $1483.83?

A. Yes.

Q. Crane Co. is a dealer in plumbers supplies?

A. Yes.

Q. The Elliott Engineering Company is a concern that makes and sells engines?

A. I am not familiar with their line.

Q. Did the records of the Phoenix Plumbing & Heating Company reveal what the item of $5,944.00 owing to The Elliott Engineering Company consisted of? A. No.

Q. Were there any invoices?

A. There may have been; I don't know.

Q. You didn't go to the invoices? A. No.

Q. Do you know the nature of the business done by the Oil Burning Equipment Company?

A. Yes.

(Testimony of Jerrie Lee.)

Q. What did they deal in?

A. Installed oil-burners for heaters.

Q. Their amount was in the sum of $4,429?

A. Yes.

Q. Did the books reveal what the items were that went to make up that account? [429] A. No.

Q. Did you look at the invoices to ascertain?

A. I did not.

Q. The Southwestern Mfg. & Supply Company?

A. No.

Q. Do you know what the Williams Peper Company deals in? A. No.

Q. The Los Angeles Supply Company?

A. No.

Q. Do you know the Allison Steel Company?

A. Yes.

Q. They manufacture iron ware?

A. Yes, iron and steel.

Q. In either of these cases did you go to the invoices to find out any of the items? A. No.

Q. You just went to the books? A. Yes.

Q. You made no attempt, in making up this statement, to ascertain through the invoices what particular contracts the various items making up these accounts payable were charged to?

A. The scope of my investigation was not of a nature which permitted a general audit for the reason that I spent only about two days on it before I came up here. I did not have time to verify accounts receivable or payable; that is about a six months' job to set up that on a basis that would be intelligible.

(Testimony of Jerrie Lee.)

Q. But the invoices would reveal—would give you the information as to which jobs the various items in this supply house been charged to, wouldn't they?

A. Not having investigated them, I couldn't say. [430]

Q. You are a certified public accountant, and have been for a number of years making audits of several kinds, general outline audits and others, thorough audits of the accounts and books of companies—that is true, isn't it? A. Yes.

Q. And these audits have extended to business houses over a wide range of business enterprises?

A. Yes.

Q. And in making these audits it is absolutely necessary that you have a good working knowledge of the trade customs of the company you audit?

A. Yes.

Q. Then you know as a matter of fact that where supply houses are dealing with a retail concern such as the Phoenix Plumbing & Heating Company where they are delivering finished articles and the Phoenix Plumbing & Heating Company installing them in different jobs, that they insist on the contracts showing the jobs or contracts which they are to be used in, do you not?

A. I can answer that by referring to the invoices which speak for themselves.

Q. Can you or can you not answer?

A. If the invoices were submitted to the Phoenix Plumbing & Heating Company.

Q. I am asking about the trade custom.

(Testimony of Jerrie Lee.)

A. It is true that some firms do, but it is not true that Crane Co. did; the Standard Sanitary attempted to follow it, but not to the letter. On the Central Heating Plant job, an item of $175.05 is marked just "called for"; $502 is marked Central Heating Plant job; they are not consistent with it; I don't know whether it is true with other wholesalers or not. [431]

Q. But in any event, you did not go to the invoices? A. No.

Q. But without going to the invoices and without finding out whether the $41,000 due the Standard Sanitary Company for material delivered to the Phoenix Plumbing & Heating Company was placed in these accounts that went to make up the accounts receivable, you deducted all of the contracts not yet paid from the assets—the ones not yet completed, I mean? A. Not yet completed? Yes.

Q. If you had gone to the invoices and found that that $41,000 owing to the Standard Sanitary was charged to the contracts receivable, would you then have deducted the $45,000 on those contracts that you did, in those statements?

A. If I had gone into a general audit, which you are calling for now, I would have gone back if it had been possible and the records had been complete, to jobs of every kind and built up an accounting system, and at that time, when I set up contracts receivable I would have set up the other side, the liability side, and it would have been reflected.

Q. And then if you had made a complete audit

(Testimony of Jerrie Lee.)

this statement you have submitted here would reflect the total amount of contracts receivable?

A. Yes.

Q. And under that general head you would have two columns, one of the things that had been charged against that, and another material furnished? [432]

A. That would be reflected on the liability side.

Q. And there would be the amount of money to be received as against these charges?

A. Yes, that is true.

* * * * * * * * * * *

Q. In addition to the amount due on the city hall job you also deducted the sum of $40,000 on the asylum job? A. Yes.

Q. Now, at the time you examined the books in August did you find any records of the Phoenix Plumbing & Heating Company showing what the condition of that asylum job was on the 30th of April?

A. That was the job that I was informed by the bookkeeper and Leo Francis had not been completed; it had been started just a short time before this period, and it was completed between April 30th and August 17th.

Q. You did not in that case look at the invoices to see whether or not all the material to be used on the job had been delivered on the 30th of April?

A. No.

Q. You just took that amount of $40,000 from the accounts receivable?

(Testimony of Jerrie Lee.)

A. Yes, for the reason that I was told it was not a completed job, and was therefore not an asset.

Q. You were not told it was not an asset?

A. No, that was my reason for taking it off.

Q. If in making up the statements you had found from the invoices that all of the work on that job had been done and nothing remained except the payment of money, would you have taken that $40,000 out of the assets?

A. No, I didn't in the other assets.

Q. But you did not attempt to find out at the time you were making the statement as of April 30th, whether that [433] job was completed?

A. I did. That was why I eliminated it; they told me it had not been completed.

Q. You knew when you made the audit that there were other sources of information besides Fretz, and Leo Francis that would aid you in ascertaining the status of the jobs?

A. I considered that the most reliable that could be used on April 30th.

Q. Isn't it a fact that when Francis and Fretz made that statement to you, you took that statement and did not look any further to find out the status of the account? A. That is true.

Q. And this was the asylum job? A. Yes.

Q. And you knew it was the asylum job, didn't you? A. The books said it was.

Q. You knew there were books available on the status of that job in the office of the architect and in the office of the state board of public institutions, did you not?

(Testimony of Jerrie Lee.)

Miss BIRDSALL.—I object to that; he has testified to a statement he made from the records of the company and such information as he saw; it has nothing to do with the issues here that there were other records.

(Argument by counsel.)

The MASTER.—If the sources were not material or should not have been noted, the effect of it is the opposite of that intended by him; if it was material, he has a right to show that; that is a fair question.

(Exception to Master's ruling taken by Miss Birdsall.) [434]

A. From my own knowledge, no.

Q. When you went there to look over the books and work as of April 30th, you saw around there this account in which was listed money contracts receivable, did you not? A. Yes.

Q. And it was listed as the insane asylum job, this one?

A. Yes, pardon me—it was listed under W. H. Brown.

Q. At that time the state of Arizona was putting up this addition to the insane asylum? A. Yes.

Q. You knew that W. H. Brown was the contractor?

A. I think he is the doctor or superintendent out there.

Q. But you saw his name? A. Yes.

Q. And you made no inquiry?

A. Yes, I asked and they said it was the asylum job.

Q. And you know, not only as an accountant but

(Testimony of Jerrie Lee.)

as a citizen, that such accounts are kept at the office of the Board of state institutions, do you not?

Miss BIRDSALL.—I object to that; it is not a proper question.

A. I know that state records are kept at the state house, yes, sir.

Q. Then at the time you were examining these books to prepare this statement as of the 30th of April, you made no further attempt beyond the statements of Fretz and Francis as to this job?

A. No.

Q. And despite this general knowledge you had of the status of that, you never attempted to find any further information beyond those statements?

A. I took it as it was shown on the books. [435]

Q. This is a matter of fact, regardless of any statements—if in truth and in fact the records showed that job was completed except for the payment of money, you would not take that $40,000 out of the assets, would you? A. No.

Q. You found that the amount to complete the E. J. Bennitt job was $1,968.68 on the 30th of April?

Miss BIRDSALL.—I object to that; his statement shows that amount stood on the books and that it was uncompleted.

Q. You found that there was $1,968.68 still to be paid on the E. J. Bennitt contract?

A. Yes.

Q. And you deducted that from accounts receivable? A. Yes.

Q. That was the total amount of that contract?

(Testimony of Jerrie Lee.)

A. The original contract was for $2,898.30.

Q. On April 30th approximately half of that contract was to be paid, wasn't it?

A. Yes, sir. There were additional charges for extras.

Q. And you didn't deduct those charges?

A. No.

Q. Those were extras that had been completed?

A. Yes.

Q. You left those in the assets? A. Yes.

Q. You did not ascertain whether or not the total amount of material that had been purchased from the Standard Sanitary and formed a part of the accounts payable in the liability column had been purchased and delivered to that job on the 30th of April? [436]

A. I think it would have been impossible to do so.

Q. You didn't examine any of the invoices or seek any further information on that?

A. No, sir.

Q. So that you did not know at the time you deducted that $1,968 from the assets, the contracts receivable, whether that sum represented any part of the material that had been delivered by the Standard Sanitary Company for that job, do you?

A. No.

Q. And the same situation is true in regard to the F. B. Schwentker job in the sum of $2,634; you just took that amount that remained to be paid and deducted that without ascertaining whether that $2,634 covered any portion of the amount of material that was charged against the Phoenix Plumb-

(Testimony of Jerrie Lee.)

ing & Heating Company in the items of accounts payable?

A. I handled it as I did all the contracts; knowing that unfinished contracts are not assets, I eliminated it.

Q. And the same is true of the Junior College job which showed that there was $4,136.50 yet to be paid on the contract. A. Yes.

Q. And it is equally true on the library job?

A. Yes.

Q. In the amount of $9,410.12? A. Yes.

Q. And it is equally true of the Harry Tritle job? $1,551.75? A. Yes. [437]

Q. And that is the situation with the Union High School job, $5,717.00? A. Yes.

Q. And the Bachowetz apartments reported to you as being unfinished?

A. It was reported to me, as I have stated, that it was in litigation and with a first mortgage which took precedence over the lien, and Leo Francis told me it had no value; that he would never recover anything on it.

Q. What did the books reveal on the 30th of April, 1929, that the job was finished?

A. It didn't state whether it was started or finished.

Q. But it did reveal there was a balance of $3,700 on the contract? A. Yes.

Q. Did you attempt to ascertain whether the Phoenix Plumbing & Heating Company had stopped work of their own volition or whether they had been stopped?

(Testimony of Jerrie Lee.)

A. I was told they had stopped work on it. I didn't ask the circumstances.

Q. But on the 30th of April there had not been a question raised as to the prior mortgage or the possibility of a mortgage?

A. Not to my knowledge.

Q. And on the 30th of April they were still working on the job, weren't they? A. I don't know.

Q. You didn't know, you don't know now whether they were still working on the Bachowetz job on April 30th? [438] A. I don't know.

Q. Did you make any inquiries?

A. My inquiry was as to the value of the amount as an asset; I was told it was not completed and that they could never collect anything on it.

Q. You got that information when?

A. It must have been in September, 1929.

Q. And taking information you received at that time, as of the 30th of April, removed it from the column of assets? A. Yes.

Q. Now, if on the 30th of April, the books of the Phoenix Plumbing & Heating Company showed that they had bought this $2,000 worth of material from the Standard Sanitary Mfg. Company and these other supply houses, and that material had been delivered and was on the premises of April, 1929, would you list these goods as an asset of one concern?

A. Yes, sir, because they would be in their possession.

Q. When they received these goods—you would list it as an asset because it was in their possession?

(Testimony of Jerrie Lee.)

A. Yes.

Q. So that the $6,000 worth of material would appear as an asset? A. As an inventory asset.

Q. Yes, it would be on the black side rather than the red? A. Yes. [439]

Q. Isn't it a fact that instead of that material being delivered on the floor of the Phoenix Plumbing & Heating Company, they simply went through there and went to the various jobs they were working on, after it was bought from these various concerns?

A. It isn't in their possession then, and the recovery is not understood; it would be contingent on the completion of the jobs before they could realize it.

Q. When it went into these jobs it became a part of the buildings that were being constructed and became the property of the people building the building; that is true, isn't it?

A. I think so; yes. [440]

Purely from an auditor's point of view, the Phoenix Plumbing & Heating Company had a potential asset in lieu of the material delivered into the possession of other people contingent upon their performing and completing their contracts. It was a potential asset from the time they delivered the material to these people, always bearing in mind that it is contingent upon something. That is the rule auditors apply to such a situation.

I went down there August 13th to make the audit and this statement of August 17th was based on

(Testimony of Jerrie Lee.)

what I actually found there then. On that date there was a total of $49,073.66 standing on the books of contracts receivable, with one exception—there was $13,000 showing on the books as of the Lincoln Mortgage Company, but the cash books showed Lincoln Mortgage Company had paid, and it had never been credited.

When I made the audit of April 30th I left the amount showing the balance due on the Lincoln Mortgage Company job in contracts receivable as an asset, because the books revealed that job was completed and all that remained was the payment of the money. It was treated as an asset, as completed work.

On the 17th day of August the cash book showed it had been paid. On August 17, 1929, there were listed contracts receivable in the amount of $49,-073.66. I deducted $3,700.00 on account of the Backowitz Apartments; $887 on account of the City Hall job; $1,973.50 on account of the Schwentker job; and $3,342 on the central heating plant of the High School job; $2,106 on the Jr. College job. The amount remaining to be paid on the High School Library and classroom job was $9,410.12; and the Yuma High School job of $2,719.92. [441]

I eliminated the $3,700 on the Backowitz Apartments from the assets on the same grounds used in making the April 30th statement. That was information from one of the partners, Leo Francis, and that the job was in litigation and they did not expect to collect any money on it.

(Testimony of Jerrie Lee.)

I ascertained from the records in the Recorder's office that there was a first mortgage due November 1, 1928, and that the first mortgage would probably take over the interest of everyone there. I got the amount of the mortgage from the recorder's office, but did not write it down. I didn't examine to find if there was a foreclosure. I took the information of Mr. Francis. I did not know on August 17th whether that mortgage was being foreclosed.

I didn't find out how far the job was completed. I was told it was a worthless account. On August 17th there still remained a balance to be paid on the City Hall contract as on April 30th. I knew that City Hall job was being taken over by the Bonding Company on August 13th. I knew from the Bonding Company taking over the City Hall job that there was something wrong with it. I did not ascertain what amount of money was necessary to finish it. I didn't know what was necessary to be done to finish it. About October 5th I was informed that what was necessary to finish it would cost approximately $700.00.

This statement was prepared as of August 17th and I attempted to prepare it on information at hand that would have been used as of August 17th. If I should prepare a statement as of December 5th I would probably use other figures. I attempted to set up only what information was available on August 17th. I knew that in preparing this statement as of August 17th there were records in the City Hall and in Lescher & Mahoney's office

(Testimony of Jerrie Lee.)

as to the status of the City Hall job. [442] The information which was received from Leo Francis and Mr. Fretz was the only information in my possession as of August 17th. The other information was not available until October 5th. I knew on August 17th the records on this job were in Lescher & Mahoney's office and in the City Hall. The Schwentker job for which I deducted from the accounts $1,973.50 on my statement of August 17th had been taken over by the Massachusetts Bonding Company for completion the first part of August. I did not as of August 17th try to ascertain how much of the accounts payable in the amount of $64,987.47 consisted of materials that had been delivered to the Schwentker job. That is true of the City Hall and the Backowitz Apartments. The central heating plant job for which I deducted $3,342.70 as of August 17th was taken over by the American Bonding Company about the first part of August. I did not attempt to ascertain, what, if any, part of the accounts payable had been delivered to that job.

The Jr. College job was also taken over by the Bonding Company about the first of August—between the first and 15th of August. I deducted from the accounts receivable $9,410.12 on account of the library and class-room job because that had been taken over by the American Bonding Company and was not treated as an asset. I made no attempt to ascertain what portion of the accounts payable was material delivered to that job.

(Testimony of Jerrie Lee.)

I deducted $2,019.92 as of August 17th from the accounts receivable on the Yuma High School job which had been taken over by the Massachusetts Bonding Company prior to August 13th. I did not know as a matter of knowledge that the job was practically completed on August 17th.

Mr. Stuppi did not tell me at the time I was retained to make this audit for the Yuma job, that the job was practically [443] completed. I don't recall our conversation. I was employed to make a survey and report on the Standard Sanitary Manufacturing Company account of the Phoenix Plumbing & Heating Company as it affected the bonded jobs.

I got my information that the Yuma High School was an uncompleted job from Leo Francis. The fact that it was uncompleted and that it had been taken over by the Bonding Company were the reasons I did not deem it as an asset. The only reason I took out of the contracts receivable the amounts yet to be paid on them as of April 30th was because it is my contention that the work being uncompleted they were not assets.

On August 17th, 1929, I based my deduction of these amounts of $31,960 upon the fact the work was not completed and that the Bonding Companies had taken over the control from the Phoenix Plumbing & Heating Company.

Referring to the two checks of Walter Shayab, dated April 22d, one for $1,015 and the other for $205, which checks are in evidence, I have two check

(Testimony of Jerrie Lee.)

stubs here for the check to him in the sum of $1,015. One in the check book of stubs No. 2722 and also in the pocket size check stubs marked F–75. Petitioners' Exhibit No. 9 in evidence does not fit in the perforation of the check stub book No. 2722. The book check No. 9 in evidence is 3x6. The length from the end of the stub is 8 inches. It is apparent that Petitioners' Exhibit No. 9 in evidence and No. F–75 was not taken out of the large check stub book. Taking check stub which has for identification F and a serial number and applying Petitioners' Exhibit 9 in evidence to that, it appears that this check came from that stub. It is apparent that check stub 2722 is not the check stub for check F–75. In each case where the bookkeeper took one of the small checks in pocket size Check book F, in serial number, and entered same check in stub in check stub book, he [444] put the check from the book stub back as a void check. I had not the bank deposit book of the Phoenix Plumbing & Heating Company, covering the period of from September 26, 1927, to June 18th, 1929. I presume this covers all the period during which there was no cash book in the records, but there is nothing to verify it. It shows entries during the 5th, 6th, 7th, 8th, 9th, 10th, 11th and 12th month of 1928. It shows nine entries in May, 15 in June, 12 in July, and shows entries for January, February, March and April of 1929. It shows twelve months in January, 1929, a number in February, 1929, and the entries continue in about the same

(Testimony of Jerrie Lee.)

ratio in April, 1929. In auditing the books of this company, I was able during January, February, March and April, 1929, to segregate some of the individual items of receipts by the Phoenix Plumbing and Heating Company. I was able to locate quite a number of the deposits and disposition of items I was interested in through the bank book of the company, but not all of them.

I did not succeed in tracing down all those I was interested in from the books of the Phoenix Plumbing & Heating Company; using that information I was able to find things in the Phoenix Plumbing & Heating Company books. I was able to trace down payments on the library job covering the period. There was no cash book; also the City Hall and central heating plant jobs.

Referring to bank book I was able on the 10th of January, 1929, to segregate out of the deposit of $2,657.50 a payment on the City Hall job of $1,628.25. I did not trace payments of $2437.50 out of a deposit of $6,428.54 on January 7, 1929, from the records of the Phoenix Plumbing & Heating Company. If there was any information available on the records of the Phoenix Plumbing & Heating Company I used it. I had a record of the Phoenix Plumbing & Heating Company deposits. I [445] did not work on the City Hall job until after the 5th of October.

The first job after I went to work on August 13 was the Schwentker and the Yuma High School and another Massachusetts Bonding Company job.

(Testimony of Jerrie Lee.)

After that, sometime in September, I went to work on jobs for the American Bonding Company, which were the library, heating plant and Junior College. When I started to work on these I traced down payments of the Phoenix Plumbing & Heating Company through the architects' record. Green and Hall were the architects on the Schwentker job. I don't recall the name of the man on the Yuma High School. Mr. Hall and Lescher & Mahoney and Fitzbaugh & Hughes were the architects. From their record I could find when payments were made on these various jobs. I made up this first statement as of April 30th, not on conditions coming up since. If I made a statement to-day as of December 6th, it would not be as of April 30th or August 17th.

Francis and Fretts were the only source of my information as to the disposition of various sums of money in August, 1929. I didn't investigate the records of the various architects at all until some time in September, on the status of any of these jobs. I investigated them after I had made my survey and report in order to verify it with the records, as I had found them in the records of the Phoenix Plumbing & Heating Company. I didn't have information as to that particular date as to those records in the various architects' offices on the status of the Phoenix Plumbing & Heating Company as of the dates these statements cover. I had the information at a subsequent date.

At the time I made these statements as of April

(Testimony of Jerrie Lee.)

30th and August 17th, I was using information as of those dates given by Francis and Fretts. I did not seek other information as of [446] those dates.

Referring to the account of Paul Gehres in the account receivable book, the first item of June 23d was for $1.36 for gas; Jan. 17, folio 109—$24.31; that is one of the missing books; Jan. 26, folio 109, Leo,—$25.00; Fol. 146, $44.86. The stubs are not here for January and February. I do not have folio 146 here.

Referring to Petitioners' Exhibit 5 for Identification, 7 in Evidence, that cash book for 1929 and part of 1928. The first entry there is on the Gehres account, June 23d. I don't know what year. It just says gas.

The next is January 17th. The account shows in the books as balanced and the entries refer to folio.

Referring to Lincoln Mortgage Company payment, I found nothing further than an entry in cash book showing credit for $13,000. That was paid sometime in June. It is not included in the bank deposits about that date. It is not a part of the bank statement of the Phoenix Plumbing & Heating Company.

Referring to check stub No. 2474, being one of the three checks paid to Standard Sanitary Manufacturing Company, dated April 26th, that check was in the amount of $947.94, and the entry "purchases week ending April 20." I believe the handwriting on this check stub, marked 2494, is Paul Gehres'.

(Testimony of Jerrie Lee.)

Turning to Petitioners' Exhibit No. 1 for Identification, 7 in Evidence, showing payments by Fred Noll. This shows on May 14, debit of $24.75 paid on April account. It does not show what it was for. It is just charged to accounts payable. Examining Petitioners' Exhibit 24 in Evidence, consisting of statement a number of slips, the one of 5959 is one quart of oil, 25¢; May 24, 12 gal. gas. $2.40, Notation "Tucson, paid by Dee Francis"; one dated May 13, 1929, $9.50, notation "Yuma"; May 12, 1929, tire repair, 50¢, and the words "charge [447] Dee Francis." Some of these slips attached to Petitioners' Exhibit 24 have other names, such as Safford, Glendale, Prescott, etc. I made an adding machine list of the total of them. It shows items of statements consisting of gasoline, tire repair and oil covered by that period. Debits and credits show the account was paid monthly or weekly.

I found no record at all of the Callowan affair on the books. I never made any search for Callowan.

(Examination by Mr. DRAKE.)

Referring to check No. 2608, dated May 18th, payment to Crane Company of $1000, stub 2608, dated May 9, 1929, for check payable to Crane Company, is marked "accounts payable" $1,000. The check notation is May 8th, by check 2608, $1,000, and is applied against accounts payable. That is all I have been able to discover relative to that.

Stub 2869, dated June 21, 1929, payable to Crane Company, $500.00, accounts payable, assignment

(Testimony of Jerrie Lee.)

due on Marana School. Assignment is abbreviated "assg." The notation on that is in the cash book in the same form.

(Examination by Miss BIRDSALL.)

I testified the other day that the check stubs of the Phoenix Plumbing & Heating Company, started with No. 301, March 24, 1928. There seems to be nothing previous to that time. The check stubs from December 11, 1928 to April 13, 1929 are missing.

Turning to D. L. Francis account on the books, there is no credit on the account of D. L. Francis, and there is no way of determining what, if any, credit he had. The account is set up merely as a list of liabilities of D. L. Francis, $842.32, April 26 to June 4, inclusive. There is no way of determining the true state of the account of D. L. Francis with the Plumbing Company. The only information I have found [448] on the books of any amounts of D. L. Francis for money turned into the Arizona Garment Company would be the check stubs or cancelled checks and that merely stated where the money went, whether it went into the factory. There is nothing to indicate that it was a charge against D. L. Francis.

Of the payments made to Joe Thomas, one loan account is marked D. L. Francis, through the company to Joe Thomas. That account was read into the record the other day, and showed certain amounts purporting to have been loans made by D. Francis from his insurance. From the records

(Testimony of Jerrie Lee.)

there is no way of tracing through that account to ascertain whether these loans were actually made by D. L. Francis and put into the Phoenix Plumbing & Heating Company. The dates of these loans are April 22 "forward" $241.00; April 23, cash $5.00; April 27, U. S. Government Insurance loan, $275.00; $526.82, May 15; May 22 Southern Surety Company, sickness insurance, $40; amount of $275.00 April 27 is taken in by the Phoenix Plumbing Company as a cash receipt on account of loan from D. Francis.

On page 6, line 14 of Petitioners' book 6 for Identification, 7 in Evidence, taken into cash for Phoenix Plumbing & Heating Company $526.82, marked U. S. Government insurance, D. Francis; a loan from D. Francis on page 8, line 5, item appears of Southern Surety Company taken into cash $50, loan from D. L. Francis; page 2, line 7, $5.00, taken into cash as loan by D. Francis; item of $241 doesn't appear in cash book.

The account of Joe Francis covering 12 payments made to him for a short period covers period from May 1, 1929, to June 5, 1929.

There is another account on which there is a credit to Joe Francis of $500.00 on May 19th; on page 4, line 29 is an item received from Joe Francis as receipt for $500 given in credit on loan account, $500.00. There is nothing to show how [449] that came in. The cash book indicates that it was put in the bank account.

Examining the account on the other side on May

(Testimony of Jerrie Lee.)

16th, there was a check of $19.87 returned unpaid. The $500 payment was taken in on May 10; the check was returned unpaid on May 16th. The $10.87 check was given on April 30th. I have no way of tracing whether that was a check given on the same bank as the $10.87.

Referring to deposit book 6 in evidence, Petitioners' Exhibit 14, as to whether from my examination I could state whether all transactions of the Phoenix Plumbing & Heating Company during the period from December 1928 to April 30, 1929 went through the bank from my examination indicates that at least one item of $4000 did not go through this book. It went into the bank book. One transaction as I recall at this time did not show on the book. It is true that the bank book is not a complete record of the cash transactions of the Phoenix Plumbing & Heating Company over that period, as to at least one instance. I never checked any others. The deposits in the bank book go to June 18th. Between June 18th and August 17, 1929, there were no deposits whatever as shown by the books. The book is not full.

The transactions between June 5th and June 10th shown on the books of the Phoenix Plumbing & Heating Company of $13,000 to the Lincoln Mortgage Company was not deposited in the bank at all. The cash book indicates the payment, but there is no record in the deposit book.

I was not able to tell from the records of the Phoenix Plumbing & Heating Company whether the other

(Testimony of Jerrie Lee.)

payments at a previous or subsequent time were made to the Phoenix Plumbing & Heating Company. I did not go through the bank book at all; the bank statements and records would only show a record of [450] such items as were deposited.

I did not find from the records of the Phoenix Plumbing & Heating Company which I examined, duplicate deposit slips covering the deposits made in the bank showing what the items were. I remember seeing one or two, but no complete file of them. I saw those in the office of the Receiver. There was not a complete record of deposit slips from December, 1928, to June, 1929. The general ledger that is missing is one that extends so far as I am able to determine from December, 1927, to April 22, 1929, and the cash book which is missing is from June 1, 1928, to April 22, 1929. The old cash book ends the latter part of May, 1928, and the new one begins April 22, 1929.

There is no liability side shown on the general ledger from which I have testified.

Referring to the accounts of the Standard Sanitary Manufacturing Company that was carried on the books of the Phoenix Plumbing & Heating Company in one general open account as accounts payable. When credits were given for payments made to the Standard Sanitary Company they were charged against that general account. As shown on the books of the Phoenix Plumbing & Heating Company payments were never credited against any particular job of the Standard Sanitary Company.

(Testimony of Jerrie Lee.)

Among the checks which I have testified to, were those for weekly payments made during April and May, 1929. The stubs indicate that it was for purchases during the week but there is nothing to indicate what job the material bought and paid for by that check was delivered to. The check for $947.94 was included in the credits given the Standard Sanitary Manufacturing Company previous to the statement made as of April 30. From a statement found in the files but not from the book record, I can give the amount due and owing by the Phoenix Plumbing & Heating Company to the Standard Sanitary Manufacturing [451] Company on June 21, 1929. This statement shows the balance due on January 1, 1929 to the Standard Sanitary Manufacturing Company was $24,460.49. On February 1, 1929, the amount due was $30,670.79. On March 1, $38,042.20. On April 1, the amount due was $43,582.25. The amount due on August 17, 1929, was $39,552.62. That amount is included in the liabilities shown on August 17, 1929.

Referring to my testimony in regard to my reasons for eliminating the $3,700 item on the Bachowitz account, I did have information that a mechanic's lien was filed during June 1928. The information I had was from Fretts and Leo Francis that the account was of no value. They told me the reasons why and I searched the record in the book of mortgages at the Court House. That is about the extent I went into it. According to the

(Testimony of Jerrie Lee.)

records that have been introduced here the mechanic's lien had been filed a year before that.

In the statement I made as of April 30th and the statement as of August 17th, all amounts shown on the contracts receivable book of payments made on the contracts were credited. I verified these amounts in the architect's office some time in October. I used to the best of my knowledge and belief the information with reference to the credits due on the contract.

(Examination by Mr. DUFFY.)

With reference to the missing check stubs and the search I made for them when I went down to get the records of the company on August 13th, the records were in boxes scattered throughout the building. There were 3 or 4 rooms. We searched every room and found records in every room, mutilated checks, etc.

Later when Mr. Thalheumer took over the records, I went down with him and we made a search of the premises in addition to my own search, in the presence of Mr. Fretts. There is, I think, another account for another Francis in the books. There in an accounts receivable for another employee name Leo Goldman, [452] dated May 1, 1928 for $2.25 which is in balance.

The $4,000 which I testified to did not go through the bank book, was not in the amount payable on the Asylum job. There was no cash book for that period. The Asylum job does not appear to have gone through the cash book.

(Testimony of Jerrie Lee.)

I testified on redirect examination that one amount of $4,000 did not go through the bank book. I traced that through the contracts receivable record. If a concern kept a full set of books, including a general ledger, inventory account, etc., if they handled cash without it appearing in any of those records, they could never get a balance of their accounts.

In going through the books of the Phoenix Plumbing & Heating Company, I attempted to trace down matters for various clients. There are some things I have looked for and couldn't find. In order to give my clients a pretty correct status of their question, I had to go to outside information.

There were no payments to the Standard Sanitary Manufacturing Company during January or February. There was a payment on March 14th of $6,000, check No. 2185, and on April 13, check 2384 for $2,500.

(Examination by Miss BIRDSALL.)

There were no other payments during April. The others appear in May. [453]

TESTIMONY OF HOWARD O. WORKMAN, FOR PETITIONING CREDITORS.

Direct Examination by Miss BIRDSALL.

My name is Howard Workman. I have lived near Phoenix 8 years. Am acquainted with Walter Shayab who stays in Phoenix part of the time for his health. He lives in Boston. He is here

(Testimony of Howard O. Workman.)

now living at the Jefferson Hotel. He is here for his health and has no business.

Referring to Petitioners' Exhibit No. 9 in Evidence, check made to Walter Shayab, signed Phoenix Plumbing & Heating Company, dated May 19, 1929, endorsed by Walter Shayab; that is my endorsement on the check. I borrowed $1,500 from Mr. Shayab and this check was part of it. I think probably Mr. Shayab had just gotten that check and he did not take it to the bank. I don't remember just what the balance was, but I think it was around $1,500 and that check was a part of it. I do not know the circumstances of his receiving the check from the Phoenix Plumbing & Heating Company. I only know D. L. Francis when I see him. Mr. Shayab is an Assyrian and I have known him about 6 years. He and I are friends and I borrowed the money from him. I don't think he makes a practice of loaning.

I deposited the check at the Valley Bank, and it went through my account. I don't know for what the Phoenix Plumbing & Heating Company gave Mr. Shayab this check. I had not been negotiating my loans with Mr. Shayab very long before this check was given me. I could tell from my deposit book when I deposited the check.

Mr. Shayab can be located at the Jefferson Hotel. He just came back a few weeks ago. I am here for my health. I borrowed the money to buy some land out here and put a few cabins up for rent. My place is on West Van Buren Street. [454]

(Testimony of Howard O. Workman.)
(Examination by MASTER.)

I didn't see this check made out. When I saw it, it was endorsed by Walter Shayab. I did not see him endorse it. To the best of my recollection no one else was present when I received this check except Mr. Shayab. This business occurred in the lobby of the Jefferson Hotel.

I do not know Mr. P. C. Gehres. I did not know that that name was on the check. I don't remember who endorsed it but I thought it was Mr. Francis. I never noticed Gehres' name before.

(Examination by Miss BIRDSALL.)

I never had any conversation with Mr. D. L. Francis about the matter. I am familiar with Mr. Shayab's signature and this signature looks like his. This one is new to me (indicating Paul C. Gehres' signature). The name, Walter Shayab, in the main part of the check looks a little like Mr. Shayab's handwriting. Of course the body of the check is made by Francis. It seems that the name is written in in a different handwriting. I never heard tell of that man (indicating Mr. Gehres' signature).

I deposited the check in the Valley Bank and didn't check on it that very day, but when I did check on it it had gone through. I never gave a note to Mr. Shayab for it. This money went to buy a lot and I put in quite a little myself and I am going to get another loan on it which will go ahead of Mr. Shayab, so I can go ahead and get a second mortgage. That was our understanding.

(Testimony of Howard O. Workman.)

I have never paid him anything on the $1,500 I borrowed and at the present time he holds no mortgage. I will give him a second mortgage if he wants it. I do not know whether he is a man of means. He has no family. I think he was a plumber in Boston. I don't think he had any connection with the Phoenix Plumbing & Heating Company. He never mentioned to me the [455] reason for having a check from the Phoenix Plumbing & Heating Company.

(Question by the MASTER.)

I have known him about 6 years and I had other business relations with him. I have received letters from him but I haven't kept them.

TESTIMONY OF W. K. FETTER, FOR PETITIONING CREDITORS.

My name is W. K. Fetter. I am manager of R. G. Dun*n* Company. I have been in Phoenix since March 1, 1919. In my position as manager of R. G. Dun*n* & Company I am accustomed to receive financial statement from different firms in Phoenix.

I have brought with me the last statement made by the Phoenix Plumbing & Heating Company to R. G. Dun*n* & Company. I don't know the date of it. It was mailed August 14, 1928, on the last statement, but a statement that they made. This is the original statement and the envelope in which it was received.

(This statement received in evidence marked Petitioners' Exhibit 26 in Evidence, with the understanding that a copy may be later substituted for the original in the record.) [456]

B.–522.

PETITIONERS' EXHIBIT No. 26.

In Evidence.

12–5–29.

STATEMENT AS A BASIS FOR CREDIT.

MEMO TO

R. G. DUN & CO.

THE MERCANTILE AGENCY.

On the Financial Condition of The Phoenix Plumbing & Heating Co.

Location—316 N. 6th Ave. Phoenix, County of Maricopa, State of Arizona.

Business—Plumbing & Heating Contractors & Engineers.

Date to which all the items of the statement relate—June 1, 1928.

Full Names of All Partners:

Mr. D. L. Francis. Age, 34. Married or Single—Married.

Mr. Lyon Francis. Age, 23. Married or Single—Married.

Mr. Leo Francis. Age, 22. Married or Single—Married.

How long in business here? 11 months. Whom do you succeed, if anyone? Wm. Remsbottom. Where from, Town and State? Fort Smith, Arkansas. Former occupation? Heating &

Plumbing Engineers. Ever fail? No. If so, when and where? ————.

ASSETS (When no figures are entered use the word NONE).

Merchandise on hand at cash value	$ 6,042.95
Outstanding accounts at realizable value.	2,642.78
Notes receivable at realizable value	223.40
Cash on hand,) Both	
Cash in Bank)	1,684.38
Machinery, Fixtures, etc.	2,244.75
Deposits on plans & bids	1,138.00
Due on contracts	14,300.73
Total available assets	$28,276.99

REAL ESTATE (Describe, locate and value separately, and in whose name held).

NONE.

Total value of real estate	
Mortgages or amount unpaid thereon	
Equity in real estate	
Total worth in and out of business	

LIABILITIES.

For merchandise not due (open account)	7,195.36
For merchandise past due (open account)	None
For merchandise (notes payable)	None
Loans from bank	4,000.00
Loans from friends or relatives	None
Int. Cont. pay	1,845.08
Cap. Investment Acct.	15,236.55
	$28,276.99

Is the statement of value of stock on hand made upon the basis of an inventory actually taken? And if so, on what date? Actual inventory, May 31, 1928.

What, in your opinion, is the total amount of your assets and of your liabilities as they are at the date of signing this statement? Total assets, $25%, over the above.

Total liabilities, $25%, over the above.

Amount of chattel mortgages, if any, on stock or fixtures—$ None.

If any of the above accounts are pledged state the amount—$ None.

Are there any existing liens on personal property not mentioned above? If so, what? Conditional sales contract on fixtures and machinery. [457]

B.–522.

Page 2.

PETITIONERS' EXHIBIT No. 17.
For Identification.

Contingent liabilities upon bills of exchange, endorsements, guarantees, etc. $ None. Annual sales (estimate)—$120,000.00. Annual Rent—$636.00. Annual Expenses—$4,500.00.

Do you keep books of account of the business? Yes. If so, name them—Cost system, cash journal, general ledger, contract and accts. Rec. ledger.

Fire protection. State its general nature—public fire department, sprinkler system, fire extin-

guishers, night watchman, etc.—Watchman and public Fire Dept.

INSURANCE: On Merchandise—$1,800.00. On Machinery and Fixtures—$500.00. On Buildings—$ None.

Did you ever suffer a fire loss? No. If so, where and when?

Did fire originate on your premises? ———

Do you carry employer's liability insurance? Yes.

Date of signing statement August 14, 1928.

PHOENIX PLUMBING & HEATING,
PAUL E. GEHREN,
Cashier.

B.–522. Petitioners' Exhibit No. 17 for Identification. [458]

Back of No. 26:

IMPORTANT.

Kindly give the names of a few houses from whom you make your largest purchases.

Name	Street Address	City and State	Amount Owing
Standard San. Mfg. Co.	447 E. Jefferson	Phoenix, Arizona	Current
Crane Company	233 S. 1st Ave.	Phoenix, Arizona	Current

Bank with Commercial National Bank of Phoenix, Arizona.

TRUE COPY OF ENVELOPE.

Phoenix Plumbing & Heating Co.
316 North Sixth Avenue
Phoenix, Arizona.

Postal cancellation
Phoenix
Aug. 14
1. 5:30 PM
1928
ARIZ.

R. G. DUN & COMPANY.
Heard Building.
Phoenix, Arizona.

(Stamp)

(Testimony of Frank McNichol.)

This envelope contained statement of Phoenix Plbg. & Htg. Co., Received by me 8/15, 1928. (Signature) Z. [459]

TESTIMONY OF FRANK McNICHOL, FOR PETITIONING CREDITORS.

(Examination by Miss BIRDSALL.)

My name is Frank McNichol. I am cashier of the Commercial National Bank. I have held that position about a year and one month. I came to Phoenix from Prescott about the middle of October, 1928, and at that time had a conversation with him as to who constituted the Phoenix Plumbing & Heating Company. Dee Francis and myself were present at that conversation. I called him in there to find out, to get acquainted with the business. The first thing I asked him was if it was a corporation. He says it wasn't, that he and his two brothers were partners. That he handled the financial work and the estimating and that the other two members were practical plumbers and *supervised construct;* along the lines of organization, that was about all he said.

I think he mentioned salaries. Said they paid each one a salary and building profits. I had subsequent conversations with him each time he made application for a loan, and we went over these statements he would hand me. I do not recall any conversation in regard to the membership of the firm except the one I have mentioned. I definitely remember when he first came in in October and estab-

(Testimony of Frank McNichol.)

lished the fact that he and his brother were the Phoenix Plumbing & Heating Company and that was later confirmed by Dunn and Bradstreet reports.

Referring to Petitioners' Exhibit No. 18 for Identification that is a statement that was handed to me by Dee Francis for the purpose of trying to influence us to give them further loans. It was handed to me soon after February 15, 1929.

(Statement is received in evidence marked Petitioners' Exh. 27 in Evidence.) [460]

B.–522.

PETITIONERS' EXHIBIT No. 27.

In Evidence.

PHOENIX PLUMBING & HEATING COMPANY.

Phoenix, Arizona.

Work in Progress and Finished.

February 15th, 1929.

Job.	Contract Amt.	Paid.	% Complete	Bal. Due.
Arizona Grocery Co.	105.00	———	60%	105.00
Arizona Guarantee Mortgage Co.	746.75	———	Not started	746.75
Bachowitz Apartment	3,700.00	———	65%	3,700.00
ckeye Arizona School	5,635.50	5,462.50	Finished	173.00
State Insane Hospital	6,841.00	3,580.00	60%	3,261.00
Phoenix City Hall	22,374.00	12,375.00	80%	9,999.00
Episcopal Deanery	2,563.90	2,325.00	Finished	238.90

Job.	Contract Amt.	Paid.	% Complete	Bal. Due.
Washington School Building	695.00	———	50%	695.00
Dan Campbell Residence	1,530.00	———	50%	1,530.00
H. H. Green New Residence	1,723.97	1,700.00	95%	23.97
H. H. Green Old do.	469.00	———	60%	469.00
W. W. Knorpp Residence	1,640.40	1,230.30	90%	410.10
Mr. Dowell Residence	2,540.00	———	40%	2,540.00
E. J. Bennett Residence	3,898.30	2,200.00	80%	1,698.30
Lincoln Mortgage Co. Balance due on 41 cottages now finished				15,435.92
Mesa Bank Building	5,228.00	1,582.50	75%	3,645.50
Patterson Residence	306.54	264.00	Finished	42.54
Grace Luthern Church	594.50	297.25	Finished	297.25
Phoenix High School Stadium	16,116.50	15,469.90	Finished	646.60
Phoenix High School Library Bldg.	17,822.00	2,437.50	40%	15,384.50
Phoenix High School Heating Plant	27,819.00	12,580.00	85%	15,239.00

Job.	Contract Amt.	Paid.	% Complete	Bal. Due.
Phoenix Junior College Bldg.	8,424.00	3,787.50	70%	4,636.50
Dr. Schackleford Residence	564.00	———	50%	564.00
Tolleson Arizona School Bldg.	3,871.00	2,150.00	Finished	1,721.00
Mel Fickas Residence	1,069.00	———	50%	1,069.00
Marcus B. Kelley Residence	648.75	———	50%	648.75
Linn Lockhart Residence	4,461.00	1,937.50	80%	2,523.50
H. Keyfavur Residence	1,280,00	———	60%	1,280.00
Hoggan Residence	346.75	———	50%	346.75
Frank Bowman Residence	237.00	———	60%	237.00
Joe Samardo Residence	140.00	40.00	95%	100.00
Getney & Snell Residence	336.75	———	60%	336.75
Perry & Taylor Residence	491.00	———	Finished	491.00
		Unpaid Balance		$90,235.58

(Testimony of Frank McNichol.)

Mr. D. L. Francis, Mgr. aided by figures from the wholesale houses on a very liberal estimate that it will require the sum of $48,550.00 to cover all MATERIAL & LABOR necessary to complete all of the above work.

Signed—PAUL C. GEHRES.
Phoenix Plumbing & Heating Co.

The above is a true and correct statement of the work in progress and completed this Fifteenth day of February, 1929.

B.–522. Petitioners' Exhibit No. 18 for Identification. [461]

At the time this statement (referring to Petitioners' Exh. 27 in Evidence) was handed me, I had requested them to bring in a list of moneys that was due to them and this was brought to me in response to my request. After that statement was given to me I had conversations with D. L. Francis as to whether any of these contracts had been assigned, and Mr. Francis said that no contracts had been assigned. He repeatedly made that statement to me. Every time he brought a list in I would ask him if any had been assigned, but he would always say no.

Referring to Petitioners' Exh. 27 in evidence, among other statements, there is a contract of the Lincoln Mortgage Company after showing an amount due of $15.435. At no time subsequent to the date of that statement did I have any notice or knowledge that that contract had been assigned. During the month of May, 1929, I had a conversation with D. L. Francis in regard to the assign-

(Testimony of Frank McNichol.)

ment of contracts. I remember one time very distinctly I met D. Francis as I was coming out of the bank. It was the day before they got the last loan from the bank and he said he needed a thousand dollars. I told him he would have to take it up with Mr. Norris, the president of the bank. I asked him if he still had the money coming on the Court House job and he said yes. I said, "Were any of them assigned?" and he said no. I said I would like him to cover them with some kind of security and asked for assignments of the various jobs. When I got back to the bank a loan of $1,000 had been made to him by another officer of the bank.

(Examination by Mr. PHLEGAR.)

When I first came in contact with D. L. Francis I asked him if the business was incorporated and he said no. I asked him what it was and he said it was a partnership of three brothers. I do not recall whether I asked him for a financial statement at that time, but I did soon afterwards and it was [462] furnished.

The statement furnished should show the assets and liabilities of the Phoenix Plumbing & Heating Company, the cash on hand and contracts under construction. After that when we made loans we asked him several times for lists of the amounts of money due to him so that we could see where he would pay his loans from. All of the statements he furnished dealt with the Phoenix Plumbing business, as it was then being conducted by the Phoenix Plumbing & Heating Company.

(Testimony of Frank McNichol.)

I never requested a statement of the personal holdings of any of the individual members.

The credit which we extended to the Phoenix Plumbing & Heating Company was extended on the statement and representation made by D. L. Francis as to the actual operations of the company.

TESTIMONY OF O. E. SCHUPP, FOR PETITIONING CREDITORS.

(Examination by Miss BIRDSALL.)

My name is O. E. Schupp. I am attorney for Leo Francis, one of the bankrupts and the Phoenix Plumbing & Heating Company. As such attorney I filed schedules of admission of willingness to be adjudged a bankrupt by Leo Francis. I prepared these schedules for Leo Francis as his attorney. Those schedules were filed about the 18th or 19th of September and were made up as affecting the business of the Phoenix Plumbing & Heating Company as of August 17, 1929.

(Examination by Mr. DUFFY.)

I began the preparation of those schedules sometime around the 17th of August, probably five or six days afterwards and obtained the information from the books and papers and from information Leo Francis gave me. The books were in the hands of the Receiver and I had access to them.

TESTIMONY OF J. G. WAGONER, FOR PETITIONING CREDITORS.

J. G. WAGONER (As representative of Crane Company, appearing in response [463] to subpoena served on Mr. Benner as manager of Crane Company).

(Examination by Miss BIRDSALL.)

My name is J. G. Wagoner. I am cashier and bookkeeper and credit man for Crane Company. In response to subpoena served upon Mr. Benner I have produced here certain records of Crane Company, being the original accounts receivable, ledger sheets showing various debits and credits and certain assignments made by the Phoenix Plumbing & Heating Company to Crane Company.

I have with me assignments to Crane Company dated June 5, 1929 (marked Petitioners' Exh. 19 for Identification). The pencil memoranda on that was put on after it was given. (Assignment received and marked Petitioners' Exh. 28 in Evidence.) [464]

B.–522.

PETITIONERS' EXHIBIT No. 28.

In Evidence.

Phoenix, Arizona, June 6, 1929.

For value received, the undersigned hereby sells, transfers, sets over and assigns to Crane Co. all his right, title and interest in and to his book accounts and claims of every nature against the fol-

lowing named persons in the following named amounts, to wit:

(Pencil Notation)

($1000.00 due from E. J. Bennitt, Country Club Drive, Phoenix, Ariz.

(800.00 due from Harry Tritle, No. Alvarado St., Phoenix.

Go after. not legible 24465

(500.00 due from O. P. Johnson, Verde Lane, Phoenix.

(800.00 due from Frank B. Schwentker, Alvarado & Monte Vista, Phoenix.

~~500,00~~ due ~~from~~ ~~Marana,~~ ~~Teacherage Building,~~ ~~Marana,~~ ~~Arizona.~~ (Pencil Notation) ~~Pd. Jan. 21.~~

~~500,00~~ due ~~from~~ ~~Dan~~ ~~Campbell,~~ ~~W. Cambridge~~ ~~St,~~ ~~Phoenix.~~ (Pencil Notation) ~~Paid 7/17/29.~~

225.00 due from James Barnes, ~~1300~~ 1606 Block W. ~~Latham~~ St., Phoenix Lynwood

400.00 due from O. R. Bell, 917 No. 8th St., Phoenix.

) 400.00
) 196.01 Pr.
) 7/31/29
) 203.99 Bal.
) due.

PHOENIX PLUMBING & HEATING CO.
By LEO FRANCIS,
Owner.

(Testimony of J. G. Wagoner.)

Approved:

CLIFF FRYBERGER,

Manager.

We, the above named, hereby consent to, accept and agree to the above named assignment.

Accepted by E. J. Bennett for the amount finally found due but not to exceed one thousand dollars. June 2/1929.

E. J. BENNETT.

(Pencil Not.) Jas. W. Barnes. Amount $225.00. 6/9/29.

Petitioners' Exhibit No. 19 for Identification. [465]

This assignment was drawn in Mr. Townsend's office. I had nothing to do except to take Mr. Francis up to Townsend's office. Mr. Francis had talked to Mr. Benner about it.

Referring to the original books of entry, as to payments made under this assignment, we received on the assignment of the Marana School job $500 on June 21st. We received $500 on the Campbell assignment on July 6th, and we received $198.01 on the Bell assignment. That is the last assignment there. It was dated August 1st. Those are all the payments received on those assignments.

Crane Company received another payment on account of the Phoenix Plumbing & Heating Company after June 6, being $804.72 on July 6 from the McGinty Construction Company. That payment was made direct and did not come through the Phoenix Plumbing & Heating Company. I cannot say whether any credit of that amount is

shown on the books of the Phoenix Plumbing & Heating Company.

Mr. Fryberger gave Mr. McGinty directions to pay that direct. It was on the Safford Hotel job and it was their own arrangement, not ours.

On July 20th we received $81.70, the payment being made direct to Crane Company by Mrs. Harry Tritle. This was not made under any assignment. We had an assignment of the Tritle account, but this had nothing to do with it. When they finished that job, it seems they wanted a water-heater. They called up about it and wanted it sent down there. They asked if we would send it out and we did send it out. It was a direct deal with Mrs. Tritle, but we did not think of doing anything without their permission. Mr. Fryberger knew all about it. We never received any payments at all on this assignment of the Harry Tritle matter, nor any payments on the E. J. Bennitt assignment. I don't know whether the Bennett amount has been paid. I went [466] to Mr. Benner about it and he said there was some question as to the amount of money due, and it was understood that if anything was due it should be paid.

I don't know whether the Harry Tritle job has been paid for to the Phoenix Plumbing & Heating Company. We never tried to collect this $800.00.

I have testified to all the payments received by Crane Company since June 6th, both after these assignments and otherwise.

Referring to my records as to the payments received by Crane Company between April 17, 1929,

(Testimony of J. G. Wagoner.)

and August 17, 1929, on May 9th there was a payment of $1,000 on account. That is the only cash payments we had received up to the time of these other payments. We had a waiver of lien on these assignments to the amount of assignments from the Standard Sanitary.

(Witness produces waiver which is received in evidence marked Petitioners' Exh. 29 in Evidence.) [467]

B.–522.

PETITIONERS' EXHIBIT No. 29.

In Evidence.

12–11–29.

Letter Head.

STANDARD SANITARY MFG. CO.,
447 E. Jefferson Street,
Phoenix, Arizona.
June 7, 1929.

To Whom it May Concern:

After reviewing assignments given by Phoenix Plumbing and Heating Company to Crane Company, covering the following jobs, in amounts as stated, to wit:

$1000.00 due from E. J. Bennitt, Country Club Drive, Phoenix, Arizona.

800.00 due from Harry Tritle, No. Alvarado St., Phoenix,

500.00 due from O. P. Johnson, Verde Lane, Phoenix.

800.00 due from Frank B. Schwentker, Alvarado & Monte Vista, Phoenix.

(Testimony of J. G. Wagoner.)

500.00 due from Marana Teacherage Building, Marana, Arizona.

500.00 due from Dan Campbell, West Cambridge St., Phoenix.

225.00 due from James Barnes, 1300 Block W. Latham Street, Phoenix.

400.00 due from O. R. Bell, 917 N. 8th Street, Phoenix.

We do herewith release our rights, title and interest in the above accounts, in the amounts as stated, and do herewith relinquish any and all lien rights we may have in said jobs, except in any amount above that which is entered against such jobs in this instrument.

Yours truly,
STANDARD SANITARY MFG. CO.,
By I. L. NIHELL.
I. L. NIHELL.

ILN:HL.

B.–522. Petitioners' Exhibit No. 20 for Identification. 12–11–29. [468]

We had no other waivers of liens or consent to assignments from the Standard Sanitary or any other creditor in our possession.

Referring to our records the amount due to Crane Company on August 17, 1929, from the Phoenix Plumbing & Heating Company was $3,503.24. At the present time the amount due Crane Company is $3,467.47. There were a couple of credit memorandums after the time of these payments which makes the difference shown.

After June 6, 1929, the dates of these assignments

(Testimony of J. G. Wagoner.)

no material was furnished on credit to the Phoenix Plumbing & Heating Company, except some material on order that was delivered a few days after the order. The last was on June 17. That was the heater I spoke of to Mrs. Tritle.

Our account with the Phoenix Plumbing & Heating Company was carried as an open account and materials were not credited to the various jobs but credits made when they were paid.

(Examination by Mr. DUFFY.)

At the time the payment was made by the McGinty Construction Company nothing was said by Mr. McGinty as to who was doing that job. He called me up to come and get the job.

Mr. DRAKE.—On behalf of Crane Company I now desire to ask leave of court to withdraw the answer on behalf of Crane Company, objecting to the adjudication herein.

The MASTER.—The motion is granted upon condition that Crane Company pay its proportion of costs to the date of this proceeding, as shall later be legally determined and fixed by the court. (Petitioners' Exh. 10 for Identification, Letter of Southern Surety Company, is received in evidence and marked Petitioners' Exh. 30 in Evidence.) [469]

B.–522.

PETITIONERS' EXHIBIT No. 30.

In Evidence.

12–11–29.

Letter Head.

SOUTHERN SURETY COMPANY OF NEW YORK.

1201 National City Bank Building,
Los Angeles, Calif.
August 8, 1929.

Phoenix Plumbing & Heating Co.
316 North Sixth Ave.,
Phoenix, Arizona.
Atten: Mr. Fryberger.

Re: Bond 453393—Phoenix Plumbing & Heating Company to City of Phoenix—Plumbing contract in New City Hall Building at Phoenix—LA#1578–28.

Gentlemen:

With reference to the above contract, we enclose copy of letter dated August 6th from Attorneys Armstrong, Lewis & Kramer, which is self-explanatory.

We had hoped that you would be able to work out of your difficulties without any of the creditors making formal demand for the payment of their accounts. I wish you would write me in some detail what progress you have made since my talk with you in Phoenix, and whether you think it would be possible to reach a satisfactory adjustment with the

Standard on some basis by which this creditor will look to you for payment.

You might have a talk with the Standard manager before writing me. I shall hope to hear from you by the middle of next week.

Yours very truly,
L. D. BARTLETT,
Claims Manager.

LDB:MB.
ENC.

Petitioners' Exhibit No. 10 for Identification. [470]

B.–522.
PETITIONERS' EXHIBIT No. 30.
In Evidence.
12–11–29.

"COPY."

ARMSTRONG, LEWIS & KRAMER,
Phoenix, Arizona.

Southern Surety Company of N. Y.
Los Angeles, Calif.

Re: City Hall Plumbing Contract.
Phoenix Plumbing & Heating Co.

Gentlemen:

We are counsel for the Standard Sanitary Manufacturing Co. with offices in Phoenix, and we have before us the figures showing the status of the City Hall job.

There remains to be paid on the contract by the City of Phoenix to the Phoenix Plumbing and Heating Company the sum of $8,700 and some odd dollars. The unpaid material bills for materials

furnished and now installed in the City Hall, standing on the books of the Standard Sanitary Manufacturing Co. against the Phoenix Plumbing and Heating, amount to the sum of $16,918.74.

Under the terms of the contract and bond of the Phoenix Plumbing and Heating Company which your company underwrote, your company is liable for the payment of this amount. There appears no possibility of the Phoenix Plumbing & Heating Co. paying the difference between the amount due on the job and the amount due for materials furnished therefor; hence, we are compelled to make demand upon you for the payment of the $16,918.74 due for materials installed in the building.

We would appreciate your early consideration of and decision, on this demand.

Yours very truly,
ARMSTRONG, LEWIS & KRAMER.
By FRANK J. DUFFY.

Petitioners' Exhibit No. 10 for Identification. [471]

(Petitioners' Exhibit 21 for Identification was received in evidence, marked Petitioners' Exh. 31 in Evidence.) [472]

B.–522.

PETITIONERS' EXHIBIT No. 31.
In Evidence.
12–11–29.

To the Board of Trustees of Phoenix Union High School District, Maricopa County, Arizona.

Gentlemen:

On the 18th day of October, 1928, I entered into

a contract with your District wherein, among other things, I agreed to the satisfaction and under the direction of your District and Lescher & Mahoney, the Architects for the District, to provide all the materials and perform all the work mentioned in the specifications and as shown upon the drawings prepared by said architects for the installation and completion of the plumbing, heating and ventilating in the library and classroom building located on property belonging to the District, bounded by Sixth, Seventh, Taylor and Van Buren Streets, in the City of Phoenix, Arizona, and for the faithful performance of which contract the District agrees to pay me the sum of $18,828.00 as follows:

$10,330.00 for the installation of the heating and ventilating and $8,498.00 for the installation of the plumbing, payments to be made upon estimates and certificates of the architects upon the 1st and 15th days of each month for seventy-five per cent of the cost of materials furnished on the ground or placed in the building and labor performed thereon, the final payment of twenty per cent reserved from previous estimates or installment payments to be made when the building is completed and finally accepted by the District, and upon which contract there has been paid me up to this date approximately $9,000.00. I wish to advise you that owing to unforseen financial difficulties I have fallen in, the Standard Sanitary Manufacturing Company at Phoenix, Arizona, who has been furnising me the materials to perform said contract now refuses to furnish me further materials for use in the completion of the contract, and in as much as I cannot ob-

tain the necessary materials from any other source to fulfil the contract with I have appealed to the American Bonding Company of Baltimore, the surety on my bond for the performance of said contract, to financially assist me in securing the necessary materials to complete the contract and in the circumstances, the American Bonding Company of Baltimore as the surety on my bond has consented to secure for me the materials necessary to complete the contract, as well as money necessary to pay the labor to properly install said materials provided I protect said surety for the materials which it will furnish me and the moneys to be paid by it for the labor to install said materials under the contract.

Therefore, in order to perform said contract and complete the same to the satisfaction of your District and said architects, and to protect said surety, I hereby authorize and empower you to pay over to the American Bonding Company of Baltimore, a corporation, the surety on my bond for the fulfillment of said contract, all moneys now due me or to become due to me under the terms of said contract and which will amount to approximately $9,000.00 when said contract is completed, and I hereby authorize and empower said American Bonding Company of Baltimore to receipt for said [473]

Board of Trustees of Phoenix
Union High School District—2

moneys in my name to your District and when so receipted for by said American Bonding Company of Baltimore it shall be deemed as my receipt therefor, and I hereby waive any and all claim against your District for said moneys or any part thereof

which may be paid to said American Bonding Company of Baltimore as above stated.

I also wish to advise you that I have and do now rescind and recall any and all assignments by me heretofore made of the moneys due and to become due under said contract to any and all persons, corporations, partnerships or associations, and direct and authorize you to ignore and disregard any such assignments whether the same have been heretofore or may hereafter be presented to you.

Signed—LEO FRANCIS.

Phoenix, Arizona, August 6th, 1929.

I, J. W. Laur, of Maricopa County, State of Arizona, do hereby swear that the above is a true and exact copy of the original letter.

J. W. LAUR.

Sworn and subscribed to before me, a notary public, in and for the County of Maricopa, State of Arizona, this 3rd day of December, 1929, at Phoenix, Arizona.

P. S. BASSFORD.

My commission expires Mar. 30, 1930.

B.–522. Petitioners' Exhibit No. 21 for Identification. [474]

TESTIMONY OF I. L. NIHELL, FOR PETITIONING CREDITORS.

I L. NIHELL (Manager of Standard Sanitary Manufacturing Co.)

(Examination by Miss BIRDSALL.)

My name is I. L. Nihell. I am manager for the Standard Sanitary Manufacturing Company. I

(Testimony of I. L. Nihell.)

have produced in response to subpoena on the Standard Sanitary Manufacturing Company certain assignments made by the Phoenix Plumbing & Heating Company between the dates of April 17, 1929, and August 17, 1929, these assignments being Central Heating plant job, library building job and Phoenix Junior College, dated May 7 (produced by witness received in evidence and marked Petitioners' Exh. 32 in Evidence). [475]

B.–522.

PETITIONERS' EXHIBIT No. 32.
In Evidence.
12–11–29.

Letter Head.
PHOENIX PLUMBING & HEATING COMPANY,
316 North Sixth Avenue,
Phoenix, Arizona.
May 7, 1929.

To Whom It may Concern:

We herewith assign all moneys now due or to become due on Contract for Material and Labor on the High School Heating Plant, Phoenix, Arizona, to the STANDARD SANITARY MFG. CO., 447 East Jefferson Street, Phoenix, Arizona; and do herewith instruct the Honorable School Board, Clerk of the Board, or any other party or parties who may be designated to make payment of this money, to make payment of same to the above

named firm at the address given, as such payments may become due.

Yours truly,
PHOENIX PLUMBING & HEATING CO.
By D. FRANCIS (Signed),
Manager.

Witness to above signature.
PAUL E. GEHRES (Signed).

B.–522. Petitioners' Exhibit No. 22 for Identification. 12–11–29. [476]

B.–522.

Petitioners' Exhibit No. 32.
In Evidence.
12–11–29.

Letter Head.
PHOENIX PLUMBING & HEATING COMPANY,
316 North Sixth Avenue,
Phoenix, Arizona.
May 7, 1929.

To Whom It may Concern:

We herewith assign all moneys now due us or to become due for Plumbing on the High School Library Building, Phoenix, Arizona, to the STANDARD SANITARY MFG. CO., 447 East Jefferson Street, Phoenix, Arizona; and do herewith instruct your Honorable School Board, Clerk of the Board, or any other party or parties to whom this may be addressed, to make payment of said moneys

to the above named firm at the address given above, as said sums may become due.

Yours truly,
PHOENIX PLUMBING & HEATING CO.
By D. FRANCIS (Signed),
Manager.

Witness to above signature.
PAUL E. GEHRES (Signed). [477]

B.–522.
Petitioners' Exhibit No. 32.
In Evidence.
12–11–29.

Letter Head.
PHOENIX PLUMBING & HEATING COMPANY,
316 North Sixth Avenue,
Phoenix, Arizona.
May 7, 1929.

To Whom It may Concern:

We hereby assign all moneys now due us or to become due us on Contract for Plumbing on the Phoenix Junior College Job, Phoenix, Arizona, to the STANDARD SANITARY MFG. CO., 447 East Jefferson Street, Phoenix, Arizona; and do herewith instruct your Honorable School Board, Clerk of the Board or other party or parties to whom this may be addressed, to make payment of said moneys to the above firm at the address given above, as said sums may become due.

Yours truly,
PHOENIX PLUMBING & HEATING CO.
By D. FRANCIS,
Manager.

Witness to above signature.

PAUL C. GEHRES.

B.–522. Petitioners' Exhibit No. 22 for Identification 12–11–29. [478]

The assignment of the Yuma High School job is the only other one that I know was given by the Phoenix Plumbing & Heating Company during the period between April 17, 1929 and August 17, 1929. (Assignment produced by witness and received in evidence, marked Petitioners' Exh. 33 in Evidence.) [479]

B.–522.

PETITIONERS' EXHIBIT No. 33.
In Evidence.
12–11–29.

Letter Head.
STANDARD SANITARY MFG. CO.,
447 E. Jefferson Street,
Phoenix, Arizona.

April 26, 1929.

Board of Trustees,
Yuma High School,
Yuma, Arizona.
Att'n Clerk of the Board:

Gentlemen:

We hereby assign all moneys now due us or to become due us on Contract for Plumbing on the Yuma High School Gymnasium, Yuma, Arizona, to the STANDARD SANITARY MFG. CO., 447 East Jefferson Street, Phoenix, Arizona; and do herewith instruct your Honorable School Board,

(Testimony of I. L. Nihell.)

yourself, or any other party or parties to whom this may be addressed, to make payment of said moneys to the above named firm at the address given above, as said sums may become due.

Yours truly,

PHOENIX PLUMBING & HEATING CO.

By LEO FRANCIS,

Owner.

Witness: HELEN LANGDON.

Petitioners' Exhibit No. 23 for Identification. [480]

We held other assignments prior to April 17, 1929. The amount due the Standard Sanitary Manufacturing Company by the Phoenix Plumbing & Heating Company on the night of August 17, 1929, was $37,564.58. I could not tell what amount is due and owing to the Standard Sanitary Manufacturing Company by the Phoenix Plumbing & Heating Company at the present time. I haven't the books here showing it. I could not state without the original books of entry approximately what is due and owing to the Standard Sanitary Manufacturing Company from the Phoenix Plumbing & Heating Company at the present time.

Without having the records to refer to I cannot state what payments have been made subsequent to August 17th, that have been credited to that account, nor can I state them approximately. There was one $10,000 payment. That is all that I know about it without reference to the record. That payment was made on account of a contract existing prior to August 12, 1929. It was credited on

(Testimony of I. L. Nihell.)

open account. Our account with the Phoenix Plumbing & Heating Company was carried as an open account and not to particular jobs and contracts. Payments were just credited against the open account and not against any particular contract on the ledger.

Referring to Petitioners' Exh. 3 for Identification, 7 in Evidence, the contracts receivable ledger of the Phoenix Plumbing & Heating Company and the notation on a job under the name of W. H. Brown "balance assigned to Standard Sanitary Manufacturing Company"—I cannot explain that at all. I never saw it before. I cannot now remember of any negotiations for an assignment of that account to us on May 7, 1929. If there is a similar notation of the balance assigned on the City Hall job on these books, the same answer would apply to that. I know of no reason why there should have been any negotiations and I don't remember any. As a matter of fact we had an assignment [481] on the City Hall job prior to May 7, 1929. That is true of the Insane Asylum job. No changes in these two assignments were made on May 7, 1929, or at any time during the life of the assignments.

I don't know exactly the time we started furnishing material on the City Hall job. I have my records of the amount of material furnished on the City Hall job. The total amount of charges for materials furnished on the City Hall job up to August 6, 1929, was $16,484.46. Prior to August 8, 1929, we had notified the Southern Surety Company

(Testimony of I. L. Nihell.)

through our attorneys that we would extend no further credit on that job to the Phoenix Plumbing & Heating Company. That was approximately August 6th. It was the Southern Surety Company that was notified on the City Hall job.

I cannot say whether we notified the bonding company on the Yuma High School, the Phoenix Junior College and the Central Heating Plant, and library and class-room job at about the same time, that we were not furnishing them material. I don't believe we notified them at all at that time. It is hard to say when we notified them. Some of them were notified when they came in and wanted to draw material. It all depended on what dates they wanted to credit more charges against the job. I couldn't say whether the bonding company or the Phoenix Plumbing & Heating Company came to us about it. It was our refusal to extend further credit to the Phoenix Plumbing & Heating Company which caused the bonding companies to take over these jobs. I could not say whether the bonding company came to us for material before we gave notification of stopping credit to the Phoenix Plumbing & Heating Company.

I think there was one job where someone else had gone to the bonding company and they came to us before we had notified the Plumbing Company, but I could not say when it was. [482] It was not in writing. We notified the bonding company on the Schwentker job. I do not know the date, or whether it was prior or subsequent to the date we notified the Southern Surety Company. It was

(Testimony of I. L. Nihell.)

along about that time. I don't think we notified any of the bonding companies or the Phoenix Plumbing & Heating Company that we were stopping their credits on these jobs during July. I am pretty sure we didn't. I have the book here showing all payments made on account of the Phoenix Plumbing & Heating Company to the Standard Sanitary Manufacturing Company during the period between April 17 and August 17, 1929.

April 30, $967.94; May 3d, $2500; May 6, $508.94; May 13th, $695.00; May 15th, $59.85; May 23, $20.33; May 23, $49.88; May 20, $1448.00; May 31, $16.50 (credit); May 24, $6.50 (credit); July 6, $11.72; July 7, $200; July 11, $13,000; July 26, $71.22; another one, which was partly returned goods, $24.33; July 29 July 30, $933.50; August 2, $2.65; August 2, $300.00; August 3, $166.79; August 8, $1254.44; August 9, $850.00; August 10, $3.95; August 10, $343.75; another credit memo on August 16, $1,000, making the balance due as of the night of August 17th, 1929, $1,000 less than what I gave you, or $36,564.58. [483]

That $10,000 payment was made by the Southern Surety Company. They were surety on the City Hall job. It was not on any other job. That was the only one bonded by the Southern Surety Company that we had anything to do with.

The payment of $13,000 in June I have testified to was by the Lincoln Mortgage Company. I don't know on what contract the payment of August 8 of $1254.44 was made. That was a credit. It could not have been returned goods for that much money.

(Testimony of I. L. Nihell.)

I have no recollection from what source that payment was made. I don't think we have any books here that would show. We may have a copy of release of lien right on the job to indicate it was not that job. The payment on July 29, of $2,949 may have been on the Asylum job. It was along about that time that we collected about that much money.

On contract for plumbing such as we made by the Phoenix Plumbing & Heating Company, when they are started with the Standard Sanitary Manufacturing Company fixtures, some few of them could have been completed with fixtures purchased from other manufacturers, but not all of them. That depends on the method with which the fixtures are roughed in and connected. The payment of $2,949 on the Asylum job was paid direct to me. I don't know whether the Phoenix Plumbing & Heating Company show it on their credits or not. I told them I collected the money. I don't know that they did. I told them I was giving credit for it on their account.

The payment on July 30 of $1,933 was made direct to us by the contractor on the Murphy job. It was delivered to us on release of lien right against the job. I think that $1,254.33 payment was a payment made direct to us by O. P. Johnson for release of lien on his job. [484]

About July 20th of this year, I think I was in a conference at the Commercial National Bank with Mr. Fretts and some of the officers of the bank and Mr. Fryberger. I gave Mr. Fryberger some figures on materials to be furnished to complete the con-

(Testimony of I. L. Nihell.)

tract. I don't remember ever seeing a statement of total assets and liabilities at that time. But I did furnish some figures to Mr. Fryberger. He told me he wanted some figures for the purpose of lining up some of the jobs that had to be completed and he wanted to know the maximum amount that it would take to complete some of the jobs on hand and I furnished him those figures. It was an estimate, except that I made it plenty high so that he would have plenty of margin to work on.

(Examination by Mr. DUFFY.)

(Witness identifies assignment dated December 5 made by Dr. Francis, which was received in evidence marked Respondents' Exh. "D" in Evidence.)

(Witness identifies assignment dated November 5, 1928, executed by Dee Francis, which was received in evidence, marked Respondents' Exh. "E" in Evidence.)

These Respondents' Exhibits "D" and "E" in Evidence remained in my possession from the date of the execution up to the present time. There were never any negotiations made towards changing them.

Referring to Petitioners' Exhibit 32 and 33 in Evidence, consisting of four assignments executed between April 17 and August 17 by the Phoenix Plumbing & Heating Company, since the execution of those assignments we have never received any money by reason of them so far as I know. They were not accepted by the owners of the buildings described in the assignments and in one case the

owners refused to accept them. I never could get an acceptance to them. [485]

B.–522.
RESPONDENTS' EXHIBIT "D."
In Evidence.
12–11–29.

Letter Head.
STANDARD SANITARY MFG. CO.
447 E. Jefferson Street,
Phoenix, Arizona.
December 5, 1928.

To Whom it May Concern:

We hereby assign all moneys now due or to become due us on contract for plumbing and heating on State Hospital Job, now under construction, on Tempe Road near Phoenix, Arizona to the STANDARD SANITARY MFG. CO., 447 EAST JEFFERSON STREET, PHOENIX, ARIZONA; and do herewith instruct the general contractor on this job or other party or parties who are or may be designated to pay out moneys on construction work on this job, to make payment of said moneys to the above named firm at the address given above as said sums may become due.

Yours truly,
PHOENIX PLUMBING & HEATING CO.
By D. FRANCIS,
Manager.

Witness:

FRANK J. CAMPBELL—12/5/28.
I. L. NIHELL.

I herewith accept above assignment in the amount of amount due and agree to make payment of money as stated herein.

Signed—June 23, 1929. Date—W. H. BROWN.

Witness:————.

Respondents' Exhibit "D." for Identification. [486]

B.–522.

RESPONDENTS' EXHIBIT "E."

In Evidence.

12–11–29.

Letter Head.

STANDARD SANITARY MFG. CO.
447 E. Jefferson Street,
Phoenix, Ariz.
November 5, 1928.

To Whom it May Concern:

We herewith assign all moneys now due us or to become due us on Contract for Plumbing on the Phoenix City Hall Job, Phoenix, Arizona, to the STANDARD SANITARY MFG. CO., 447 East Jefferson Street, Phoenix, Arizona, and do herewith instruct the Honorable Commissioners and City Treasurer, City of Phoenix, or other party or parties to whom this is addressed to make pay-

(Testimony of I. L. Nihell.)

ment of said moneys to the above named firm at the address given.

Yours truly,

PHOENIX PLUMBING & HEATING CO.

By C. D. FRANCIS,—11-5-1928.

Manager.

Witness:

FRANK J. CAMPBELL—11-5-1928.

I. L. NIHELL—Nov. 5-1928.

Respondents' Exhibit "E" for Identification. [487]

(Examination by Miss BIRDSALL.)

Referring to Petitioners' Exh. 11 for Identification, being an agreement dated July 11, 1929, between L. W. Fryberger and Leo Francis, which has never been executed, I never heard anything of it at all. I never heard of such a thing. [488]

TESTIMONY OF DOROTHY DORRELL, FOR PETITIONING CREDITORS.

(Examination by Miss BIRDSALL.)

My name is Dorothy Dorrell. I am employed by the Lincoln Mortgage Company doing special bookkeeping, and in that position I am custodian of certain papers and canceled checks of the Lincoln Mortgage Company. I have with me, check of the Lincoln Mortgage Company to the Phoenix Plumbing and Heating Company, dated in June, 1929, for approximately $14,000.00. (Witness pro-

duces check which is thereupon received in evidence marked Petitioners' Exhibit No. 34 in Evidence.) [489]

B.–522.

PETITIONERS' EXHIBIT No. 34.

In Evidence.

12–11–29.

Face of Exhibit:

Builders. Subdividers. Brokers.

LINCOLN MORTGAGE COMPANY.

Lincoln Built Homes.

No. 2489.

Phoenix, Arizona, June 8, '29

Pay to the order of Phoenix Plumbing & Heating Co. $14000.00—Lincoln Mortgage Co.—FOURTEEN THOUSAND DOLLARS....DOLLARS.

LINCOLN MORTGAGE COMPANY.

M. E. WADDOUPS.

C. N. WYNN.

CITIZENS STATE BANK.

91–6 Phoenix, Arizona.

HENRY O. DORMAN.

This voucher is a Payment in Full of the Within Account and the Payee Accepts it as Such by Endorsement Below.

_____

_____

Endorse Here.

Phoenix Plumbing & Heating Co.

Cliff B. Freyberger, Mgr. [490]

B.–522.

PETITIONERS' EXHIBIT No. 34.

In Evidence.

12–11–29.

(Back of Exhibit.)

LINCOLN MORTGAGE COMPANY,

214 North Central Avenue.

To Phoenix Plumbing & Heating Company—Dr.

Date	Detail	Amounts
6/8/29	Payments in full for plumbing on following jobs:	
#59 Crider #1	$ 228.15	
#52 Statler #2	425.00	
#57 Lewis	475.00	
#56 Clayton	800.00	
#53 Peck	276.00	
#60 Crider #2	$239.55	
#43 Files	182.84	
#48 Williams	437.00	
#25 McGowan	150.00	
#63 Kimball	344.00	
#35 Smith #1	$230.82	
#17 Baxter	190.00	
#24 Lee	175.00	
#34 Shaw	371.38	
#54 Radcliffe	273.57	

Date	Detail		Amounts	
#49 Statler #1	$ 246.00	#47 Loza	$1134.52	#15 Ott	$ 240.00
#38 De La Cruz	202.13	#44 Niles	588.67	#26 Steele	283.45
#23 Rothermel	250.00	#30 Green	115.90	#39 Butler	457.52
#31 Miller	350.00	#28 Vaughn	340.00	#51 Anderson	620.00
#41 Harris	518.24	#42 Kennedy	112.37	#50 Berry	313.03
#40 Lane	402.82	#46 Mitchell	119.88	#32 Lair	182.62
#58 Lewis	1916.25	#36 Hatchell	300.00	#37 Reed	199.37
#61 Lynch	257.77	#55 Smith #2	247.92		
		Total	$14,196.77		
		Credit	196.77		Total amount
			$14,000.00		$14,000.00

Charge or credit job or department.

Construction

Approved—H. O. D.

PETITIONERS' EXHIBIT No. 24.

For Identification. [491]

Thereupon Petitioners' Exhibit No. 13 for Identification, being balance sheet of the Phoenix Plumbing and Heating Company, dated July 20th, 1929, was received in evidence and marked Petitioners' Exhibit No. 35 in Evidence. [492]

B.–522.

PETITIONERS' EXHIBIT No. 35.

In Evidence.

12–11–29.

BALANCE SHEET OF THE PHOENIX PLUMBING AND HEATING COMPANY, AS OF JULY 20th, 1929.

ASSETS.

Cash on hand	$ 150.00
Accounts Receivable	3,935.92
Contracts Receivable	45,119.90
Inventory	4,850.00
Labor furnished on Safford Hotel Job (Estimated)	1,000.00
Deficit	20,436.25
TOTAL	$75,492.07

LIABILITIES.

Accrued Salaries	$ 107.50
Payroll week ending July 20, 1929	550.00
Estimated Labor to complete contract	1,395.00
Estimated material to complete contracts	13,850.00
Notes payable bank	6,100.00
Accounts payable miscellaneous	15,548.57

Accounts payable Standard Sanitary Mfg. Co. 37,941.00

TOTAL $75,492.07

Petitioners' Exhibit No. 13 for Identification. 11–20–29. [493]

The answer of Crane Co., one of the objecting creditors herein, having been dismissed and upon motion of Earl F. Drake, its Councel, on December 11, 1929, the matter of apportioning, between the objecting creditors and petitioning creditors, the costs and expenses of this proceeding up to and including the said date, to be advanced by said parties at this time, pending the final taxing of costs by the Court, is presented with the request that an order be entered by the Master at this time, apportioning said costs between said parties.

After due consideration, it was by the Master ordered that the costs and expenses of this proceeding, up to and including the 11th day of December, 1929, be apportioned, for the purpose of said advancement, at this time, between said parties, as follows: One-half thereof to be advanced by petitioning creditors; one-fourth thereof to be advanced by Crane Company, an objecting creditor herein, and the remaining one-fourth to be advanced by the Standard Sanitary Manufacturing Company, an objecting creditor.

A letter was introduced by petitioning creditors addressed to Frank J. Duffy, signed by the Standard Sanitary Manufacturing Company, by R. C. Bower, Asst. Manager, and received in evidence

without objection, and marked Petitioners' Exhibit No. 36 in Evidence. It was stipulated by and between the Standard Sanitary Manufacturing Company and by petitioning creditors, and counsel for same, that the contents of said Petitioners' Exhibit No. 36 may be used and considered as a part of the testimony of the witness I. L. Nihell. [494]

B.–522.

PETITIONERS' EXHIBIT No. 36.

In Evidence.

Filed Dec. 12, 1929.

Letter Head.

STANDARD SANITARY MFG. CO.

447 E. Jefferson Street,

Phoenix, Ariz.

December 12, 1929.

Mr. Frank Duffy,

Attorney at Law,

Phoenix, Arizona.

Dear Sir:

With reference to the following items appearing as credits on the account of the Phoenix Plumbing and Heating Company:

Item No. 1—August 3, 1929, amount.....$ 166.79
Item No. 2—August 6, 1929, amount..... 300.00
Item No. 3—August 8, 1929, amount..... 1254.00
Item No. 4—August 10, 1929, amount..... 343.75
Item No. 5—August 16, 1929, amount.....1000.00

Item No. 1 is cash received and covering miscellaneous small repair jobs.

Item No. 2 is remittance received from the Phoenix Plumbing and Heating Company on the John Mason Ross Job. The same applies to item No. 4. A Release has been issued on this job.

Item No. 3 covers remittance received from the Phoenix Plumbing and Heating Company on the O. P. Johnson Job, which job has just been finished and will of necessity have to be liened, unless we receive a remittance for the balance immediately.

Item No. 5 is an advance amount for materials to be used in the Safford Hotel Job, paid by the McGinty Construction Company.

Trusting the above information is satisfactory, we are

Yours truly,
STANDARD SANITARY MFG. CO.
By R. C. BOWER,
R. C. BOWER, Asst. Mgr.

RCB:HL. [495]

It was stipulated between counsel that petitioning creditors rest with the understanding that testimony of Fred Blair Townsend may be received at a later date as a part of their case.

Announcement was made by Frank J. Duffy, Esq., counsel for Standard Sanitary Manufacturing Company, in open court, that he rests at this time.

Motion of counsel for alleged bankrupts, D. L. and Lyon Francis, to strike various parts of testimony was thereupon made and by the Master denied.

TESTIMONY OF FRED BLAIR TOWNSEND, FOR PETITIONING CREDITORS.

(Examination by Miss BIRDSALL.)

My name is Fred Blair Townsend. I am a practicing attorney, representing Crane Company, one of the objecting creditors in the proceeding herein. Referring to Petitioners' Exhibit No. 11 for Identification, which is an unsigned contract between Leo Francis and the Phoenix Plumbing and Heating Company and L. W. Fryberger, dated July 11, 1929, I will state that I am sure there was such an instrument prepared, but whether this is the one or not, I couldn't say, as there are no identification marks on it. I do recall drawing up such a one and I am certain that someone from the Phoenix Plumbing and Heating Company came in and got a copy of it. I wasn't in Phoenix on July 11th. [496] I left about the 7th or 8th of July, or maybe the 6th. I think I dictated this instrument. The assignment was to have been made and that was probably the reason for it. That is dated the date the stenographer wrote it up and more than likely that is a copy of it. I remember she told me that someone came in and got a copy of it. I represented Crane Company, but whether the request for drawing this up came from Crane Company or was a suggestion from Fryberger, I don't recall. I recall having a conversation with Mr. Nihell in my office in regard to it. In this instrument there were a number of assignments to Crane Company and the Standard Sanitary Manu-

(Testimony of Fred Blair Townsend.)

facturing Company which I recognized, but I don't remember from whom I got the list of assignments that had been made to these creditors. I recall having some conversation with Mr. Nihell in regard to the assignment being drawn up, but I do not know whether Mr. Nihell ever had a copy of this particular assignment. I think it must have been around the 1st of July that I had this conversation with Mr. Nihell. I returned home in August, but I don't think anything was done after I got home. So far as I know, no copy of this was taken to the Commercial National Bank. It was either Mr. Ward or Mr. Drake who was going ahead with this matter.

(Examination by Mr. DUFFY.)

I remember having talked with Mr. Armstrong and yourself. I remember having a conversation with Mr. Nihell and probably that was the time, but I don't recall where. I remember we got a good deal of that information from Mr. Nihell and Mr. Fryberger. We went into the affairs of the company and the amount of business they had been doing and the profits they have—I went into the matter with Fryberger, and practically came to the conclusion that the Phoenix Plumbing [497] and Heating Company could pay off 100 cents on the dollar if a real manager was in. Fryberger was a practical man from Colorado. I cannot recall what the conversation was with Mr. Nihell, but you and I agreed that I should draw up a tentative common-law assignment, making Fryberger assignee and sending out letters to creditors

(Testimony of Fred Blair Townsend.)

explaining the situation, and asking them to agree to it. I remember this assignment, and going over it with Mr. Armstrong. It seems to me the letter. My recollection is that after going into the matter carefully we decided the thing could be put on its feet. The purpose of this was to give them the opportunity. That was authorized on the basis that there was sufficient business in the Phoenix Plumbing and Heating Company with proper management, to pay off its debts. The question was as to credits and finances, as I remember. There was nothing said at that time by any of the creditors as to the concern being insolvent.

(Examination by Miss BIRDSALL.)

The only creditors, of course, who were there, were the Crane Company, the Standard Sanitary Manufacturing Company and the Commercial National Bank. In the assignment as I drew it up I was careful to recognize that the various assignments of jobs totalling most of the work that was outstanding, should be held by the two creditors represented by Mr. Duffy and myself. I think probably all of these jobs were bonded jobs, so that the Standard Sanitary Manufacturing Company and Crane Company would have been protected by the bonds on the jobs. The Standard Sanitary Manufacturing Company and Crane Company were holding assignments of all amounts due on the largest jobs and in this assignment that was drawn up, they were insisting that other creditors recognize those assignments. I

(Testimony of Fred Blair Townsend.)

don't believe many of Crane Company jobs were bonded, although I [498] don't know. All of the Standard Sanitary Manufacturing Company's jobs are all bonded jobs. Crane Company and the Standard Sanitary Manufacturing Company would have mechanics' liens on anything that wasn't bonded. The Commercial National Bank was an unsecured creditor without any security whatever. In answering Mr. Duffy's question that it was the judgment of Nihell, Fryberger, Armstrong, Duffy and myself that this concern would be able to pull out and pay dollar for dollar, that was contingent on credit being extended and their getting material to go ahead with those jobs. It was recognized that the Phoenix Plumbing and Heating Company had to have money, that there were accounts coming in that had not been paid, and that they had to have additional material in order that work should not stop. That was the trouble—the creditors were wondering how things were going to get along. The question of pay-roll was met by the Phoenix Plumbing and Heating Company. We didn't have anything to do with that. I don't think there was any discussion about creditors having anything to do with pay-roll. The discussion centered on furnishing of materials on jobs which were under construction so that the jobs could be completed, and the money then be forthcoming, but the matter of pay-roll was something they had to take care of. The Phoenix Plumbing and Heating Company discussed these matters, that they would have to be met some way. They did not have much concern about the question of pay-roll. I guess they were

(Testimony of Fred Blair Townsend.)

sitting pretty on that, but there was this question of materials. I cannot remember that anything was said about the Commercial National Bank advancing their pay-roll. I think there is no question but that this instrument here (Petitioners' Exhibit No. 11 for Identification) is the one that was drawn at that time in consideration of these different conversation with Mr. Duffy. I don't remember whether a letter to creditors was ever sent out. [499]

(Examination by Mr. DUFFY.)

These creditors—Crane Company and the Standard Sanitary Manufacturing Company,—agreed that they would go ahead and furnish this material in return for the protection of their assignments. I think that was substantially what was intended to be done. The Phoenix Plumbing and Heating Company insisted they were solvent, and that the profits they had would let them pay out the material bills and have some left. That was the purpose of the assignment. They proposed to do that by putting in good management.

(Examination by Miss BIRDSALL.)

When I said that "they said they were solvent," I mean the Phoenix Plumbing and Heating Company said so. I got my information from them. I never saw their books, the books of the Phoenix Plumbing and Heating Company and never went into the matter to see whether those statements were based on anything substantial. I just took their word for it. I don't know how many jobs

(Testimony of Fred Blair Townsend.)

these people were working on, except that they insisted they had substantial profits. I didn't go into the matter to see if there were any profits at all. It seems to me that Fryberger had some figures, but how exhaustive they were, I don't know. I don't know that Mr. Fryberger had only been there two or three weeks at the time of these negotiations. I don't know the list of jobs that were outstanding.

(Examination by Mr. DUFFY.)

It seems to me there was an investigation made by Mr. Nihell, Crane Company and Fryberger, but I don't remember it. It must have gotten a starting point somewhere, but I don't remember.

(Examination by Miss BIRDSALL.)

At the time these negotiations were going on, Mr. Fryberger [500] was in charge of the Phoenix Plumbing and Heating Company as manager. He was an efficient man. The necessity for making this assignment for the benefit of creditors, as I recall it is that there was a threatened suit that started this investigation, that is my best recollection. I cannot say that it was because of fear that if a suit was filed, bankruptcy would ensue and some of these assignments might be set aside as preferences was the reason for drawing this assignment. I was representing the creditor who wanted to have the suit filed, I represented Crane Company, who held a number of assignments. Thereupon Petitioners' Exhibit No. 11 for Identification

was received in evidence without objection, and marked Petitioners' Exhibit No. 37 in Evidence.

Petitioning creditors rest. [501]

B.–522.

PETITIONERS' EXHIBIT No. 37.

In Evidence.

Filed 12–27–29.

THIS AGREEMENT made and entered into this 11th day of July, 1929, between LEO FRANCIS, doing business under the firm name and style of PHOENIX PLUMBING & HEATING CO., of Phoenix, Arizona, hereinafter referred to as assignor, and L. W. FRYBERGER, of Phoenix, Arizona, hereinafter referred to as assignee, and the creditors of said assignor, consenting in writing to this agreement, hereinafter referred to as the creditors.

WITNESSETH:

That said assignor for and in consideration of the covenants and agreements to be performed by the other parties hereto, as hereinafter contained, and for the sum of One Dollar ($1.00) to the assignor in hand paid by the assignee, receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, assign and transfer unto said assignee, his heirs and assigns forever, all of the property of the assignor of every kind and nature, and wheresoever situated, both real and personal, and any interest or equity therein not exempt from execution, including particularly all of the stock of merchandise, furniture, fixtures,

bills receivable, accounts receivable, situated in or connected with or pertaining to the plumbing and heating business now owned, conducted and operated by the assignor at 316 North Sixth Avenue, Phoenix, Arizona, and including choses in action, insurance policies, cash on hand, and all other assets of any nature whatsoever.

It is understood, however, that heretofore and at various times during the past eight or ten months assignor above named has in various instances assigned and transferred to various of his creditors accounts receivable or certain interests [502] in accounts receivable owned by said assignor, said creditors having furnished materials on jobs being completed by assignor; it is hereby expressly understood that the following assignments of claims due said assignor for work done and materials furnished in the following mentioned contracts are recognized as valid, and are to be paid to the assignees, and constitute no part of the assets of said assignor:

JOB.	ASSIGNED TO:	AMOUNT.
E. J. Bennitt	Crane Co.	$1000.00
Harry Tritle	Crane Co.	800.00
O. P. Johnson	Crane Co.	500.00
Frank B. Schwentker	Crane Co.	800.00
James Barnes	Crane Co.	225.00
O. R. Bell	Crane Co.	400.00
Dan Campbell	Crane Co.	500.00
Junior College	Standard Sanitary Mfg. Co.	2257.20
Library Building	Standard Sanitary Mfg. Co.	9410.12
State Insane Asylum	Standard Sanitary Mfg. Co.	2815.30
City Hall	Standard Sanitary Mfg. Co.	8707.85
Yuma School	Standard Sanitary Mfg. Co.	2717.00
Central Heating Plant	Standard Sanitary Mfg. Co.	3507.10

and it being agreed that all creditors having or claiming to have liens on account of work done or materials furnished by said assignors waive their liens.

Said assignee is to receive the said property, conduct the said business, should he deem it proper, and he is hereby authorized at any time after the signing hereof by the said assignor, to sell and dispose of the said property on such time and terms as he may see fit, and he is to pay to said creditors *pro rata,* according to the several indebtednesses due to them from said assignor, the net proceeds arising from the conduct of said business and sale and disposal of said property, after deducting all moneys which said assignee may at his option pay for the discharge of any lien on any of said property, and any indebtedness which under the law is entitled to priority of payment, also all expenses incurred.

In consideration of the premises parties of the third [503] part agree to accept their *pro-rata* portion of the net recoveries of this estate as paid to them by said assignee, in full payment and satisfaction of their several indebtednesses, and release said assignor from all claims and demands that they now have against said assignor, provided, however, that this agreement to accept said *pro rata* and release said assignor is to become inoperative and void at the option of any of the third parties without notice if anything intervenes to precent the payment of said pro rate to said third parties by any act of said assignor or any creditor of said assignor.

IN WITNESS WHEREOF the assignor and assignee have hereunto set their hands the day and years first above written, and the joining of said creditors to be evidenced by their separate consent in writing, and by filing of their claims with the assignee.

_____,
Assignor.

_____,
Assignee.

State of Arizona,
County of Maricopa,—ss.

On this —— day of July, 1929, before me, a Notary Public in and for the County of Maricopa, State of Arizona, personally appeared Leo Francis, known to me to be the person whose name is subscribed to the within and foregoing instrument, and acknowledged to me that he executed the same for the purposes therein expressed.

_____,
Notary Public.

My commission expires: [504]

[Title of Court and Cause.]

ORDER APPROVING STATEMENT OF EVIDENCE.

The statement of evidence made by appellant under direction of the court having been duly lodged in the office of the Clerk of this court by appellant,

SHEET NO. _____ ACCOUNT NO. _____

RATING CREDIT LIMIT NAME Loan McCrum. Note

BUSINESS ADDRESS From D. Francis Thru Company To Joe Thomas

Size 1017, Form 3 Made in U. S. A.

DATE	ITEMS	FOL.	✓	DEBITS

DATE	ITEMS	FOL.	✓	CREDITS
1929				
Apr.	4 Forward { U.S. Bond 4-15-29. Ins. Load.			341 00
✓	8 Cash.			500
✓	17 U.S. Bond. Ins. Load			275 00
May	15 " " "			526 82
✓	20 So. Surety Co. Fidelity Insurance			400 00
				1941 82

5th

SHEET NO. _____ ACCOUNT NO. _____

RATING CREDIT LIMIT NAME W. Francis First

BUSINESS ADDRESS

Size 1017, Form 5 Made in U. S. A.

DATE 1929		ITEMS	FOL. ✓	DEBITS	DATE 1929		ITEMS	FOL. ✓	CREDITS
Oct.	26	Personal	C354	100					
✓	27		F.78	200					
	✓		F.79	2500					
	✓		F.80	100					
	✓		F.81	650					
	✓		F.82	2000					
	✓		F.83	1000					
	✓		F.84	1000					
	✓		F.85	2675					
	✓		F.86	350					
	✓		F.87	200					
	✓		F.88	4500					
	✓		F.89	400					
	✓		F.90	900					
	✓		F.91	600					
	✓		F.92	1000					
	27		2498	4500					
	29		2528	14886					
	29		2531	1615					
Nov	✓		2547	4598					
✓	4		2558	4500					
✓	6		2559	200					
✓	11		2616	4500					
✓	11		C506	25					
✓	18		2674	4500					
✓	18		2686	5000					
✓	25		2719	4775					
✓	27		F.90	100					
✓	29		F.94	1000					
				69471					

517

SHEET NO. _____ ACCOUNT NO. _____

RATING CREDIT LIMIT NAME Joan McGrath. Jos Thomas

BUSINESS ADDRESS

Ledger Sheet 1917. Form 3 Made in U. S. A.

DATE 1929		ITEMS		FOL.	✓	DEBITS	DATE 1929		ITEMS	FOL.	✓	CREDITS
Apr	16	Payments.	✓	1496		150 00	Apr	1	Forward.			
May	1	✓	✓	2088		98 52						
✓	8	✓	✓	2600	✓	1700						
✓	10	✓	✓	2611		50 00						
✓	11	✓	✓	2645	✓	113 46						
✓	14	✓	✓	F-98		125 00						
✓	14	✓	✓	F-103		25 00						
✓	14	✓	✓	2704		1000 00						
✓	17	✓	✓	F-105		50 00						
						1362 98						

SHEET NO. ____ ____

ACCOUNT NO. ____ 622

RATING ____ CREDIT LIMIT ____

NAME Loan Acct. Flisto

BUSINESS ____ ADDRESS Marie & Joe Francis

Size 1017, Form 3 — Made in U. S. A.

DATE		ITEMS	FOL.	✓	DEBITS	DATE		ITEMS	FOL.	✓	CREDITS
1929											
May	1	Roan	2535		150 00	April	30	Loan			1087 32
✓	3	✓	2551		80 00	May	10	✓			500 00
✓	4	✓	2559		20 00						
✓	6	✓	2570		30 00						
✓	16	Ck Returned			1087 32						
June	5		Cash		160 00						

SHEET NO. _____ ACCOUNT NO. _____

RATING CREDIT LIMIT NAME Walter S. Clayton.

BUSINESS ADDRESS Coal Hill Mount Photo

Size 1017. Form 5 Made in U. S. A.

DATE		ITEMS	FOL	✓	DEBITS	DATE		ITEMS	FOL	✓	CREDITS
May 1	1	Payment	1	✓	10 00	Apr.	1	Forward	✓		10 00
	7		F-106	✓	200 00						200 00

510

Cash Receipts

Date 1929	Received From	Total Cash Receipts	Bank Deposits	Cash Sales	Cash Receipts Returned	Contract Rec. Amt.	Contract Rec. Credit	Loan Credit	Loan Credit Acct. No.	
		Cash in Bank	1,469.00 brought forward							
1	Apr 1 Cash After explosion - Cash on Hand	14.57								1
2	Mr J. C. Jones	2.75			2.75					2
3	3 W. L. Waddups	2.70			2.70					3
4	R.W. Mcuff	168.38				168.38	Account			4
5	Bank Deposit		190.75							5
6	Cash Sale	1.00		.05						6
7	Fugue O. Francis	5.00						5.00	2.00	7
8	Bank Deposit		5.00							8
9	5 J. McFarland	7.50			7.50					9
10	14 Cash J. Irwin	10.00						10.00	Tap Rot.	10
11	Borrowed From Bank	100.00						100.00	Note	11
12	Bank Deposit		100.00							12
13	J.W. Dawson	115.00			115.00					13
14	15 W. H. Shacklford	6.75			6.75					14
15	Cash Sale - Fonts	1.25		1.25						15
16	16 Mrs. Sargent	1.75			1.75					16
17	Cash Sale Hixson	1.25		1.25						17
18	17 Fugue O. Francis - U.S. Gov. Bd	275.00						275.00	2.00	18
19	Bank Deposit		408.90							19
20	17 W. W. Ladd Lot	35.00						35.00	2.00 Rec.	20
21	24 Cash Sale Baker	3.87		3.87						21
22	Vega Bank	250.00				250.00	4050 Bank			22
23	Bank Deposit		253.87							23
24	Mrs. Esther Hughes	12.50			9.89	3.11	2.00 Note			24
25	30 W. H. O'Neil	3.25			3.25					25
26	Cash Sale	2.20		2.20						26
27	Maricopa Co. Irrig. Dist.	101.10				101.10	Stadium			27
28	Bank Deposit		235.10							28
29	W. W. Thorpe	80.00				80.00	Works			29
30	Friendship Store	16.78				16.78	Credit			30
31	F. B. Schweitzer	30.00				30.00	Schweitzer			31
32	Joe Francis	108.32						108.32	Loan	32
33										33
34										34
35					Posted	Posted		Posted		35
			2,643.24							

the said statement of evidence hereunto attached, is hereby approved by the Court and is made a part of the record, and the same contains all of the testimony in the case in narrative form, except such as is given by question and answer in order that the same might be clearly understood. Where the testimony in the foregoing statement of evidence is set forth in form of question and answer and in the exact language of the witness it is so set forth in the statement under the direction and order of this Court so that the evidence may be clearly understood.

Dated this 21st day of March, 1931.

F. C. JACOBS,
District Judge. [505]

June 1939

June				Cash Received	Cash Disbursed	Bank Deposits	Bank Withdrawals	
				$501.62	$483.31	$497.12	$576.05	1
	10	Mr Pitt P. Butler Water Supt.	Salaries Jan.		69.00			2
		Mrs D.A. Haynes	Ck Rec.	✓	7.40			3
		Mrs Beulah Francis Voided Check	Payroll Francis	1775			45.00	4
		City Water Co. Employees	"	1801			7.60	5
		Federal Reserve Bank of Denver	"	1805			17.35	6
		P. Palmedale	Payroll	1828		✓	30.00	7
		City Water Co.	Water Service Jan. 1 to Jan. 31	34		✓	10.00	8
		Cincinnati Mfg Company	Contract Ck.		100.00			9
		"	"					10
		Standard Sanitary Mfg Co	Ck Payable					11
		Bank Deposit				124.08	124.08	12
		Carl Daly	Wm McDonald		1.50			13
		Paul E. Eskres	Admr Fees Jan. Water Utility			.56		14
	11	Y.M.C.A.	M.C.	✓	4.00			15
		L.L. Smart	"	✓	1.75			16
		J.G. Berridge	"		5.60			17
		Ezra C. Thayer	"		1.40			18
		Bank Deposit				160.55	160.55	19
	12	Mrs Moore			1.60			20
		Mrs				.50		21
		James R. Moore	Edward Adams		10.50			22
		Carl Daly			.50			23
		Angora Irrigation Commission					171.47	24
		Angora Irrigation Co.	Water				31.50	25
		Paul Eskres	Office Labor				64.00	26
		Gus Brandt	Labor				10.00	27
		Lee Trailer	" mowing				15.00	28
		Mary Kimball	Rent Jan. Feb. Mar.			150.00		29
		Mrs Bass	Ck Rec		18.65			30
		W. McElroy	"		6.75			31
		Marlar Drug Store			9.78			32
		Mrs	Admr			.50		33
	14	L. Rudasill			.15			34
		Mrs Lewis			50.00			35
				$654.62	$264.57	$454.00	$661.45	

512

June 1903

17

Form 330-14 — Made in U. S. A.

	a/c Rec Freight	Colorado Mid Freight	Denver & R.G. Rental	Denver & R.G. Freight	a/c Loss & Damage Frgt	Cin. Ind. St. Louis & Chicago Passenger	Adams Express	Misc	Sale Draw
1			16772	18173					
2		16900							
3	772								
4									
5			71						
6			17						
7							3000		
8								1000	
9		100000.							
10		1300000							
11					13000000				
12									
13									150
14							51		
15	14600								
16	775								
17	560								
18	140								
19									
20	160								
21							60		
22									
23									80
24			17147						
25								3155	
26							6400		
27							100		
28							1500		
29		1500							
30	1865								
31	675								
32	2778								
33							60		
34	15								
35	5000								
	26128	1401900	178362	18173	13000000		11120	157	4150	230

[Title of Court and Cause.]

PETITION FOR APPEAL.

Comes now the Standard Sanitary Manufacturing Company, a corporation, and respectfully shows:

That on the 26th day of May, 1930, a judgment was entered by this Court wherein and whereby the Court overruled the objections of the Standard Sanitary Manufacturing Company to the Report of the Special Master, and that costs of the said Special Master be awarded against the Standard Sanitary Manufacturing Company, and that an exception was allowed on behalf of the Objectors to said ruling; that thereafter the Court caused a formal judgment to be entered adjudicating the said Phoenix Plumbing and [514] Heating Company, a corporation, et al., bankrupts, and referring the same to the Referee in Bankruptcy.

Your petitioner feeling itself aggrieved by the verdict overruling the said objections and the adjudication of the said Phoenix Plumbing and Heating Company, a corporation, et al., as bankrupts, and particularly that portion of said decree declaring that the payment of money to this petitioner by the Lincoln Mortgage Company an act of bankruptcy, hereby petitions the court for an order allowing this petitioner to prosecute an appeal to the Circuit Court of Appeals of the Ninth Circuit, under the laws of the United States in such cases made and provided.

WHEREFORE, your petitioner prays that an appeal be granted in its behalf to the United States

Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco in said Circuit, for the correction of the errors complained of and herewith assigned, and that the court make an order fixing the amount of security to be given by the petitioner Standard Sanitary Manufacturing Company conditioned as the law directs, for costs of said appeal, and that a citation issue and a transcript of record be sent to the appellate court aforesaid.

_____,

Attorney.

ARMSTRONG, LEWIS & KRAMER,

Attorneys for Standard Sanitary Manufacturing Company, Objecting Creditors.

The appeal prayed for in the foregoing petition is hereby allowed, and the cost bond to be given by appellants is fixed in the sum of $1500.00. [515]

Dated this 25th day of June, 1930.

F. C. JACOBS,

Judge.

Filed Jun. 25, 1930. [516]

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR.

Comes now the objecting creditor, Standard Sanitary Manufacturing Company, a corporation, and in connection with its petition for appeal herein, assigns the following errors, which it avers occurred in the adjudication of bankruptcy and the

acceptance of the Master's Report and confirmation thereof by the above-named court.

ASSIGNMENT OF ERROR No. 1.

The Court erred in overruling the objection of the Standard Sanitary Manufacturing Company to that portion [517] of the Special Master's Report contained in Subdivision 16 of the Master's Findings of Fact on page 5 of said Special Master's Report, which finding was in words and figures as follows:

> "16. That on or about June 10th, 1929, and within four months next preceding the filing of the petition herein, the said alleged bankrupts, Phoenix Plumbing and Heating Company, a copartnership, and Leo Francis, Lyon Francis and D. L. Francis, did, while insolvent, transfer and pay over to Standard Sanitary Manufacturing Company, a corporation, creditor, a portion of their property, to wit, money in the sum of Thirteen Thousand ($13,000.00) Dollars with intent to prefer said creditor over their other creditors."

and to which finding the following objection was made:

> "That said fiinding of fact has no foundation in the evidence submitted, because it appears affirmatively in the report of the evidence and by Respondent's Exhibit 'C' in evidence that Phoenix Plumbing and Heating Company did

on the 5th day of March, 1929, assign and set over to the Standard Sanitary Manufacturing Company all its right, title and interest to the money owed the Phoenix Plumbing and Heating Company by the Lincoln Mortgage Company on a certain contract which the Phoenix Plumbing and Heating Company then had with the Lincoln Mortgage Company, and that said assignment contained an order to the Lincoln Mortgage Company to pay to the Standard Sanitary Manufacturing Company all of the moneys owing or to become due from the Lincoln Mortgage Company to the Standard Sanitary Manufacturing Company."

and that said objection as overruled was based on the following evidence in the case:

Respondents' Exhibit "C" in evidence, which is in words and figures as follows:

"March 5, 1929.

"Standard Sanitary Mfg. Co.,
"447 East Jefferson St.,
"Phoenix, Arizona.

"Gentlemen:

"You are by this instrument authorized to draw on Lincoln Mortgage Company of this city in the amount of Fourteen Thousand One Hundred Ninety-six Dollars, Seventy-seven cents ($14,196.77),

"Which sum represents money due this firm [518] for work and materials furnished in the construction of various houses and store buildings owned by the aforesaid Lincoln Mortgage Company.

"This assignment effective this date.

"PHOENIX PLUMBING & HEATING CO.,

"By D. FRANCIS."

(Marked Respondents' Ex. *No.* "C" in Evidence.)

The check of the Lincoln Mortgage Company was introduced in evidence, being Petitioners' Exhibit No. 34. This is a check for Fourteen Thousand ($14,000.00) Dollars drawn on the Citizens State Bank of Phoenix to the Phoenix Plumbing & Heating Company and endorsed on the back, "Phoenix Plumbing and Heating Company, Cliff B. Fryberger, Mgr." All the evidence in the record on this subject is the testimony of Mr. Cliff Fryberger (Trans., Vol. 3, page 391): beginning at line 27 and ending at line 27, page 392:

> "Q. In regard to the amount of money paid by the Lincoln Mortgage Company, when was the date you went to work for the Phoenix Plumbing & Heating Company?
>
> A. I think June 5th.
>
> Q. And it was on that date that payment was made by the Lincoln Mortgage Company?
>
> A. Several days later.
>
> Q. Isn't it a fact that the way that was handled a check was made to the Phoenix Plumbing & Heating Company for $14,000?
>
> A. Yes, sir.
>
> Q. And the check was endorsed over by the Plumbing Company to the Standard Sanitary?

A. No, sir, I went to the Citizens Bank and had two cashier's checks made, one for $13,000 and one for $1,000.

Q. Taken to the bank by yourself?

A. Yes.

Q. And you took in place thereof a check for $13,000 to the Standard Sanitary Company and a check for $1,000 to the Phoenix Plumbing [519] & Heating Company? A. Yes.

Q. So that $13,000 never went through the books of the Phoenix Plumbing and Heating Company?

A. It had to go through the books.

Q. You took the check?

A. It went through the books?

Q. Then your books showed a credit of $1,000 you received?

A. We had to show it to the credit of the Lincoln Mortgage Company to settle their account.

Q. And the Lincoln Mortgage Company account was assigned to the Standard Sanitary in March? A. So I understand."

Also the testimony of Leo Francis, Vol. 1, Transcript, beginning at the top of page 172 and ending at page 173):

"Q. In your testimony yesterday you were asked about the Lincoln Mortgage Company claim; isn't it a fact that you gave the Standard Sanitary Manufacturing Company an

order on the Lincoln Mortgage Company for all the money due on March 5th?

A. Dee gave them.

Q. But you knew about it?

A. Yes, I had heard them talk of it.

Q. It was agreeable to you that they should be given? A. Yes.

Q. It was given on March 5th?

A. I couldn't say; it was in 1928.

Q. I hand you Respondents' Exhibit "C" for Identification and will ask if you ever say that before?

(Witness examines paper.)

A. I would not say that I have seen it; but I talked with Mr. Bowers about it.

Q. You knew we had it? A. Yes.

Q. The Lincoln Mortgage Company accepted it? [520] A. Yes.

Q. So that your interest in that amount of money ended there?

A. It was to apply on our account.

Q. So the truth of it was that in March, 1929, your books showed a debt of $45,000 reduced by the amount of that assignment, so far as the Standard Sanitary Company was concerned?

A. They gave us credit when they collected that $13,000.

Q. Your account was secured to that extent on the 5th of March and it increased your purchasing power to that extent, didn't it? It was their money from the time you turned that order over to them, wasn't it? A. Yes.

Q. The Phoenix Plumbing & Heating Company did not receive any money from the Lincoln Mortgage Company in June?

A. It was paid direct to the Standard Sanitary Company.

Q. On the 5th of March we all knew how much money was coming to you on that job?

A. Yes.

Q. And you knew how much of the Standard material you were going to need to finish it, didn't you? A. Yes.

Q. And in March it was collected, wasn't it?

A. You mean, the Lincoln Mortgage Company?

Q. Yes. A. Yes.

Q. When you gave this order to the Standard Sanitary, the work you were doing for the Lincoln Mortgage Company was pretty well cleaned up, wasn't it? A. Yes.

Q. There was only a little more labor and material to go in there?

A. Before that payment we done some work on some of the other jobs.

Q. That was labor, wasn't it? [521]

A. Yes."

Also testimony of D. L. Francis contained in Volume 2 of the Transcript, page 329, to the effect which is as follows: (The testimony is in regard to Respondents' Exhibit "C" filed herein.)

"Q. I call your attention to Respondents' Exhibit 'C' for Identification; have you ever seen that before? A. Yes, sir.

Q. Did you sign that? A. Yes.

Q. And delivered it to the Standard Sanitary Company? A. Yes.

Q. On the 5th of March? A. Yes."

ASSIGNMENT OF ERROR No. 2.

The Court erred in overruling the objections of the Standard Sanitary Manufacturing Company to that portion of the Special Master's report contained in subdivision 4 of the conclusions of law of the said Special Master's report, which is in words and figures as follows, to wit:

> "4. That the said alleged bankrupts and each of them did, on or about June 10th, 1929, and within four months next preceding the date of filing of the involuntary petition herein, commit a further act of bankruptcy by transfering and paying over, while insolvent, to Standard Sanitary Manufacturing Company, a corporation, the sum of Thirteen Thousand ($13,000.00) Dollars in money."

for the following reasons:

> "(1) That it affirmatively appears by the evidence in the case that the said $13,000.00 was assigned to the Standard Sanitary Manufacturing Company by the Phoenix Plumbing and Heating Company and the Lincoln Mortgage Company accepted such assignment on the 5th day of March, 1929, and that thereafter the Phoenix Plumbing and Heating Company had no control, [522] interest or right in the said $13,000.00 and that the same was not trans-

ferred and paid over by the Phoenix Plumbing and Heating Company while insolvent on or about the 10th day of June, 1929.

"(2) Because it affirmatively appears by the testimony of D. L. Francis (Rep. Trans. Vol. 2, p. 329) and by the evidence of Fryberger (Rep. Trans. Vol. 3, pp. 391–392) and by Respondent's Exhibit 'C' in evidence, that full and complete title to the said $13,000.00 passed to the Standard Sanitary Manufacturing Company on the 5th day of March, 1929, and that there does not appear in the evidence, findings of fact or conclusions of law any proof that the Phoenix Plumbing and Heating Company was not a solvent, going concern on the 5th day of March, 1929."

ASSIGNMENT OF ERROR No. 3.

The Court erred in overruling the objections of the Standard Sanitary Manufacturing Company to that portion of the Findings of Fact of the Special Master's Report contained in subdivision 5 of said Special Master's Report, which is in words and figures as follows:

"3. That said Phoenix Plumbing and Heating Company, a co-partnership, composed of Leo Francis, Lyon Francis and D. L. Francis, was at the date of filing of the petition herein, now is, and has been for more than four months next preceding the date of filing of the petition herein, insolvent."

for the reasons:

"(1) That no where in the evidence upon which the said Master's Report, Findings of Fact and Conclusions of Law are based does there appear any proof of insolvency prior to the 20th day of July, 1929, but that in truth and in fact the evidence contained in the Reporter's Transcript shows conclusively that at all times up to and including the 22nd day of June, 1929, the Phoenix Plumbing and Heating Company was a solvent, going concern and was so treated by all of its creditors, including the petitioning creditors herein, and that upon all the evidence the findings of insolvency should have been the 20th day of July, 1929."

"(2) That the evidence of Jerry Lee, the auditor who testified in this case did not reveal insolvency on the part of these alleged bankrupts until the 30th day of April, 1929, as shown by the statement of assets and liabilities compiled by the said Jerry Lee and admitted in evidence as petitioning creditors' Exhibit No. 25, and for the further reason that the [523] examination of the said Jerry Lee upon the said statement of assets and liabilities contained in Volume III of the Transcript of Evidence, page 400 to 523 revealed that the said statement is not a fair, equitable and just statement of the assets and liabilities of the said alleged bankrupt."

WHEREFORE, these defendants pray that said judgment overruling the objections of the Standard

Sanitary Manufacturing Company, a corporation, to the Master's Report in so much thereof as declares the payment of the $13,000.00 received from Lincoln Mortgage Company to the Standard Sanitary Manufacturing Company, a corporation, by the said Phoenix Plumbing and Heating Company, a corporation, be reversed, and that the costs accrued and to accrue be awarded this petitioner.

ARMSTRONG, LEWIS & KRAMER,
Attorneys for Standard Sanitary Manufacturing Company, a Corporation, Objecting Creditor.

Filed Jun. 25, 1930. [524]

[Title of Court and Cause.]

COST BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, Standard Sanitary Manufacturing Company of Pittsburgh, Pennsylvania, a corporation, as principal, and the United States Fidelity & Guaranty Company of Baltimore, Maryland, a corporation, as surety, are held and firmly bound unto Momsen-Dunnegan-Ryan Company, a corporation, Pratt-Gilbert Hardware Company, a corporation, and Union Oil Company of Arizona, a corporation, and the Phoenix Plumbing and Heating Company, a co-partnership composed of Leo Francis, Lyon Francis, and D. L. Francis, co-partners, and D. L. Francis, Leo Francis and Lyon Francis as individuals, and William L. Hart, Trustee [525] in Bankruptcy of the Phoenix Plumbing and Heating Company, a co-partnership composed of Leo

Francis, Lyon Francis and D. L. Francis, co-partners, bankrupts, in the sum of Fifteen Hundred ($1500) Dollars for the payment of which well and truly to be made, we and each of us bind ourselves, our successors and assigns, jointly and severally by these presents.

Signed and dated this 25th day of June, 1930.

WHEREAS, lately at a regular term of the District Court of the United States for the District of Arizona, sitting at Phoenix, Arizona, in said District, in a suit pending in said court between Momsen-Dunnegan-Ryan Company, a corporation, Pratt-Gilbert Hardware Company, a corporation, and Union Oil Company of Arizona, a corporation, Petitioning Creditors, against Phoenix Plumbing and Heating Company, a co-partnership composed of Leo Francis, Lyon Francis, and D. L. Francis, co-partners, and D. L. Francis, Leo Francis and Lyon Francis as individuals, in which the Standard Sanitary Manufacturing Company, a corporation and Crane Company, a corporation, were Objecting Creditors, cause No. B.–522—Phoenix on the bankruptcy docket of said court, final judgment was rendered against the Standard Sanitary Manufacturing Company, a corporation, overruling its objections to the affirming of the Special Master's report by the said District Court, and adjudging that the said Phoenix Plumbing and Heating, a co-partnership composed of Leo Francis, Lyon Francis and D. L. Francis, co-partners and as individuals, were bankrupt, and in which it was adjudged that the Standard Sanitary Manufacturing

Company, a corporation, pay the costs of suit as taxed in the sum of Five Hundred Thirty-two ($532) Dollars, and the said Standard Sanitary Manufacturing Company has appealed from the said judgment and obtained an order from this Honorable Court allowing said appeal [526] and filed a copy thereof in the office of the Clerk of said court, seeking to reverse the said adjudication in bankruptcy, or so much thereof as is affected by the objections of the said Standard Sanitary Manufacturing Company in the said suit, and a citation directed to the said Momsen-Dunnegan-Ryan Company, a corporation, Pratt-Gilbert Hardware Company, a corporation, and Union Oil Company, of Arizona, a corporation, Phoenix Plumbing and Heating Company, a co-partnership composed of Leo Francis, Lyon Francis and D. L. Francis, co-partners and as individuals, Crane Company, a corporation, Objecting Creditor, citing them to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit to be held at San Francisco in the State of California, according to law, within thirty (30) days from the date hereof.

NOW, THE CONDITION OF THE ABOVE OBLIGATION is such that if the said Standard Sanitary Manufacturing Company, a corporation, shall prosecute its appeal to effect and pay all costs if it fail upon its said appeal, then this obligation to

be null and void; otherwise to remain in full force and virtue.

STANDARD SANITARY MANUFACTURING COMPANY OF PENNSYLVANIA, a Corporation,
By J. L. NIHELL,
Its Agent,
Principal.

UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND,
By VERLAND W. HALDIMAN,
Atty-in-fact,
Surety.

Approved this the 26th day of June, A. D. 1930.
F. C. JACOBS,
Judge. [527]

State of Arizona,
County of Maricopa,—ss.

I, C. R. McFall, Clerk of the United States District Court for the District of Arizona, do hereby certify that United States Fidelity & Deposit Company of Baltimore, Maryland, whose name appears as a surety to the above and foregoing bond, is in my opinion good and ample security for the amount therein specified, and it is authorized to do business in the County of Maricopa, State of Arizona, and has property subject to execution, in excess of the amount of said bond, and if the bond is presented to me for approval the same will be accepted and approved.

WITNESS my hand and seal of office this the —— day of June, A. D. 1930.

_____,
Clerk.

Filed this the —— day of June, A. D. 1930.

Filed Jun. 26, 1930. [528]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the District Court of the United States at Phoenix, Arizona:

In the matter of the appeal of the above-entitled cause, please prepare and certify for the transcript of record, copies of the following instruments and papers on file in your office:

1. Petition for involuntary bankruptcy of petitioning creditors.
2. Answer to petition for involuntary bankruptcy of Standard Sanitary Manufacturing Company. [529]
3. Special Master's report.
4. Exceptions of Standard Sanitary Manufacturing Company to Special Master's report.
5. Respondents' Exhibit "C" in Evidence, being original assignment of Lincoln Mortgage Company's account by Phoenix Plumbing and Heating Company to Standard Sanitary Manufacturing Company.
6. Judgment overruling exceptions of Standard Sanitary Manufacturing Company and order of adjudication in bankruptcy.

7. Memorandum of costs and disbursements of petitioning creditors.
8. Objections to memorandum of costs and disbursements of petitioning creditors.
9. Taxation of costs by the Clerk.
10. Appeal to District Court from Clerk's taxation.
11. Judgment settling costs by the District Court.
12. Statement of evidence pertaining to Lincoln Mortgage Company transaction with Phoenix Plumbing and Heating Company and Standard Sanitary Manufacturing Company and date of insolvency.
13. Assignments of error.
14. Petition for appeal.
15. Citation on appeal.
16. Cost bond on appeal.
17. This praecipe to Clerk.
18. Clerk's certificate.

ARMSTRONG, LEWIS & KRAMER,
Attorneys for Objecting Creditor Standard Sanitary Manufacturing Company.

Filed Jun. 26, 1930. [530]

[Title of Court and Cause.]

COUNTER-PRAECIPE OF PETITIONING CREDITORS AND APPELLEES FOR TRANSCRIPT OF RECORD.

To the Clerk of the District Court of the United States, for the District of Arizona:

In addition to the pleadings, proceedings and papers requested to be included in the transcript of record on appeal in the above cause by the praecipe for transcript, filed herein, by objecting creditor, the Standard Sanitary Manufacturing Company, you will please include in said transcript the following papers, to wit: [531]

1. Order of reference to the Special Master.
2. Application for order of transmittal of original exhibits.
3. Order for transmittal of original exhibits.
4. Petitioning creditors' original exhibits, numbers 5, 14 and 16, in evidence.
5. Statement of all evidence before Special Master, including all exhibits.
6. Order approving statement of evidence.

Dated this 3d day of July, 1930.

ALICE M. BIRDSALL,

Attorney for Momsen-Dunnegan-Ryan Company, a Corporation, Pratt-Gilbert Hardware Company, a Corporation, and Union Oil Company of Arizona, a Corporation, Petitioning Creditors and Appellees.

Received copy of the within counter-praecipe, this 3d day of July, 1930.

ARMSTRONG, LEWIS & KRAMER,

Attorney for Objecting Creditor and Appellant.

_____,

Attorney for Trustee in Bankruptcy. [532]

Filed Jul. 3, 1930. [533]

[Title of Court and Cause.]

COUNTER-PRAECIPE OF TRUSTEE IN BANKRUPTCY FOR TRANSCRIPT OF RECORD.

To the Clerk of the District Court of the United States, for the District of Arizona:

In addition to the pleadings, proceedings and papers requested to be included in the transcript of record on appeal in the above cause by the praecipe for transcript, filed herein, by objecting creditor, the Standard Sanitary Manufacturing Company, you will please include in said transcript, the following papers, to wit: [534]

1. Order of reference to the Special Master.
2. Application for order of transmittal of original exhibits.
3. Order for transmittal of original exhibits.
4. Petitioning creditors' original exhibits, Numbers 5, 14 and 16, in evidence.
5. Statement of all evidence before Special Master, including all exhibits.
6. Order approving statement of evidence.

Dated this 5th day of July, 1930.

THOMAS W. NEALON,

Attorney for Trustee in Bankruptcy, William L. Hart.

Received copy of the within counter-praecipe, this 5th day of July, 1930.

ARMSTRONG, LEWIS & KRAMER,
Attorneys for Objecting Creditor and Appellant.

ALICE M. BIRDSALL,
Attorney for Petitioning Creditors and Appellee.

Filed Jul. 5, 1930. [535]

[Title of Court and Cause.]

APPLICATION FOR ORDER FOR TRANSMITTAL OF ORIGINAL EXHIBITS.

Come now Momsen-Dunnegan-Ryan Company, a corporation, Pratt-Gilbert Hardware Company, a corporation, and Union Oil Company of Arizona, a corporation, petitioning creditors and appellees, by their attorney, Alice M. Birdsall, and make this application to the court for an order, directing the transmittal of Petitioning Creditors' Exhibits Numbers 5, 14 and 16, introduced in evidence at the hearing before the Special Master, on the petition in involuntary bankruptcy, filed herein, and the answers of objecting creditors, and of D. L. Francis and [536] Lyon Francis, alleged bankrupts, contesting the adjudication in bankruptcy, in their original form with the transcript of record to the United States Circuit Court of Appeals for the Ninth Circuit without the necessity of making copies thereof.

This application is for the reason that the said exhibits are incapable of being copied, and should

be transmitted to the Appellate Court in their original form, for examination by such court.

WHEREFORE, these applicants pray that an order be made by this Honorable Court, authorizing and directing the transmittal of said exhibits in their original form, with the transcript of record, to the United States Circuit Court of Appeals for the Ninth Circuit, without the necessity of making copies thereof.

ALICE M. BIRDSALL,

Attorney for Momsen-Dunnegan-Ryan Company, a Corporation, Pratt-Gilbert Hardware Company, a Corporation, and Union Oil Company of Arizona, a Corporation, Petitioning Creditors and Appellees.

Received copy of the within this 10th day of July, 1930.

ARMSTRONG, LEWIS and KRAMER,

Attorneys for Standard Sanitary Manufacturing Company.

THOMAS W. NEALON,

Attorney for Trustee.

Filed Jul. 17, 1930. [537]

April, 1930, Term—Thursday, July 17, 1930—At Phoenix.

Honorable F. C. JACOBS, United States District Judge, Presiding.

MINUTES OF COURT—JULY 17, 1930—ORDER ENLARGING TIME TO AND INCLUDING SEPTEMBER 25, 1930, TO FILE RECORD AND DOCKET CAUSE.

Upon the petition heretofore filed for the Standard Sanitary Manufacturing Company, a corporation, appellant herein, it appearing to the court that it will by physically impossible to complete the record on or before the 25th day of July, 1930, because of the number of exhibits and the testimony involved in the case,—

IT IS HEREBY ORDERED that the time for filing the record and *docket* the above-entitled cause be and the same hereby is enlarged to and including the 25th day of September, 1930.

Done in open court this 17th day of July, 1930.

F. C. JACOBS,
Judge. [538]

April, 1930, Term—Thursday, August 14, 1930—At Prescott.

MINUTES OF COURT—AUGUST 14, 1930—ORDER EXTENDING TIME TO AND INCLUDING DECEMBER 15, 1930, TO FILE RECORD AND DOCKET CAUSE.

It appearing to the court that the parties hereto have agreed and stipulated that the time for filing a record in the above-entitled case be extended from the 25th day of September to and including the 15th day of December, '30,—

IT IS ORDERED that the time for filing the record and *docket* the above-entitled cause in the Circuit Court of Appeals of the 9th District be and the same is hereby extended to and including the 15th day of December, 1930.

Dated this 14th day of August, 1930.

F. C. JACOBS,
Judge. [539]

October, 1930, Term—Friday, December 12, 1930—At Phoenix.

MINUTES OF COURT—DECEMBER 12, 1930—ORDER EXTENDING TIME TO AND INCLUDING FEBRUARY 15, 1931, TO FILE RECORD AND DOCKET CAUSE.

It appearing to the court that the parties hereto have agreed and stipulated that the time for filing the record in the above-entitled cause be extended

from the 15th day of December, 1930, to and including the 15th day of February, 1931,—

IT IS ORDERED that the time for filing the record and docketing the above-entitled cause in the Circuit Court of Appeals of the Ninth District be and the same hereby is extended to and including the 15th day of February, 1931.

Dated this 12th day of December, 1930.

F. C. JACOBS,
Judge. [540]

October, 1930, Term—Monday, February 16, 1931—
At Phoenix.

MINUTES OF COURT—FEBRUARY 16, 1931—
ORDER EXTENDING TIME TO AND INCLUDING MARCH 16, 1931, TO FILE RECORD AND DOCKET CAUSE.

It appearing to the court that the parties hereto have agreed and stipulated that the time for filing the record in the above-entitled cause be extended from the 15th day of February, 1931, to and including the 16th day of March, 1931,—

IT IS ORDERED that the time for filing the record and docketing the above-entitled cause in the Circuit Court of Appeals of the Ninth District be and the same hereby is extended to and including the 16th day of March, 1931.

Dated this 16th day of February, 1931.

F. C. JACOBS,
Judge. [541]

October, 1930, Term—Monday, March 16, 1931—At Phoenix.

MINUTES OF COURT—MARCH 16, 1931—ORDER EXTENDING TIME TO AND INCLUDING MARCH 21, 1931, TO FILE RECORD AND DOCKET CAUSE.

It appearing to the court that a stipulation has been entered into by the parties hereto by which the time for filing the record in the above-entitled case is enlarged to and including the 21st day of March, 1931,—

IT IS ORDERED that the time for filing and docketing the above-entitled cause in the Circuit Court of Appeals for the Ninth Circuit be and the same is hereby extended to and including the 21st day of March, 1931.

Dated this 16th day of March, 1931.

F. C. JACOBS,
Judge. [542]

[Title of Court.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Arizona,—ss.

I, J. Lee Baker, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the

records, papers and files in the matter of Phoenix Plumbing and Heating Company, a co-partnership composed of Leo Francis, Lyon Francis and D. L. Francis, co-partners, and D. L. Francis, Leo Francis and Lyon Francis, as individuals, alleged bankrupts, numbered B.–522—Phoenix on the docket of said court.

I further certify that the attached pages, numbered 1 to 546, inclusive, contain a full, true and correct transcript of the proceedings of said cause and all the papers filed therein, together with the endorsements of filing thereon, called for and designated in the praecipe and counter-praecipes filed in said cause and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk, in the city of Phoenix, State and District aforesaid.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record amounts to the sum of $87.25 and that said sum has been paid to me by counsel for the appellant.

I further certify that the original citation issued in the said cause is hereto attached and made a part of this record.

WITNESS my hand and the seal of the said court this 21st day of March, 1931.

[Seal] J. LEE BAKER,
Clerk. [543]

[Title of Court and Cause.]

CITATION ON APPEAL.

To Momsen-Dunnegan-Ryan Company, a Corporation, Pratt-Gilbert Hardware Company, a Corporation, and Union Oil Company of Arizona, a Corporation, and to Alice M. Birdsall, Their Attorney, Phoenix Plumbing and Heating Company, a Co-partnership, and Leo Francis, and O. E. Schupe, Their Attorney, Lyon Francis and D. F. Francis, Alleged Bankrupts, and Their Attorney, E. O. Phlegar; Crane Company, a Corporation, and F. B. Townsend, Its Attorney, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, State of California, thirty days from and after the day this citation [544] bears date, pursuant to an appeal heretofore filed in the office of the Clerk of the District Court of the United States for the District of Arizona at Phoenix, wherein Standard Sanitary Manufacturing Company, a corporation, objecting creditor, is appellant, and you and each of you are appellees, to show cause, if any there be, why the judgment rendered against the said Standard Sanitary Manufacturing Company, a corporation, and the judgment of this court overruling the Standard Sanitary Manufacturing Company's objection to the Special Master's Report, and the order of adjudi-

cation in bankruptcy of the Phoenix Plumbing and Heating Company in so far as the same is affected by the said objections should not be corrected, and why speedy justice should not be done the parties in that behalf.

WITNESS the Honorable F. C. JACOBS, Judge of the above-entitled court, this 25th day of June, 1930.

[Seal] F. C. JACOBS,
Judge of the District Court of the United States for the District of Arizona at Phoenix. [545]

Filed Jun. 25, 1930.

[Endorsed]: No. 6416. United States Circuit Court of Appeals for the Ninth Circuit. Standard Sanitary Manufacturing Company, a Corporation, Appellant, vs. Momsen-Dunnegan-Ryan Company, a Corporation, Pratt-Gilbert Hardware Company, a Corporation, Union Oil Company of Arizona, a Corporation, Phoenix Plumbing and Heating Company, a Co-partnership Composed of Leo Francis, Lyon Francis and D. L. Francis, Co-partners, Leo Francis, Lyon Francis and D. L. Francis, as Individuals, William L. Hart, as Trustee in Bankruptcy of the Phoenix Plumbing and Heating Company, a Co-partnership Composed of Leo Francis, Lyon Francis and D. L. Francis, Co-partners, Bankrupts, and Crane Company, a Corporation, Ap-

pellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Arizona.

Filed March 23, 1931.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6416

United States Circuit Court of Appeals For the Ninth Circuit

STANDARD SANITARY MANUFACTURING COMPANY, a Corporation,

Appellant,

vs.

MOMSEN-DUNNEGAN-RYAN COMPANY, a Corporation; PRATT-GILBERT HARDWARE COMPANY, a Corporation; UNION OIL COMPANY OF ARIZONA, a Corporation; PHOENIX PLUMBING AND HEATING COMPANY, a Co-Partnership composed of Leo Francis, Lyan Francis and D. L. Francis, co-partners; LEO FRANCIS, LYON FRANCIS and D. L. FRANCIS, as individuals; WILLIAM L. HART, as Trustee in Bankruptcy of the Phoenix Plumbing and Heating Company, a Co-Partnership composed of Leo Francis, Lyon Francis and D. L. Francis, co-partners, Bankrupts, and CRANE COMPANY, a Corporation,

Appellees.

Brief for Appellant

ARMSTRONG, KRAMER, MORRISON & ROCHE,

Attorneys for Appellant.

No. 6416

United States Circuit Court of Appeals For the Ninth Circuit

STANDARD SANITARY MANUFACTURING COMPANY, a Corporation,

Appellant,

vs.

MOMSEN-DUNNEGAN-RYAN COMPANY, a Corporation; PRATT-GILBERT HARDWARE COMPANY, a Corporation; UNION OIL COMPANY OF ARIZONA, a Corporation; PHOENIX PLUMBING AND HEATING COMPANY, a Co-Partnership composed of Leo Francis, Lyan Francis and D. L. Francis, co-partners; LEO FRANCIS, LYON FRANCIS and D. L. FRANCIS, as individuals; WILLIAM L. HART, as Trustee in Bankruptcy of the Phoenix Plumbing and Heating Company, a Co-Partnership composed of Leo Francis, Lyon Francis and D. L. Francis, co-partners, Bankrupts, and CRANE COMPANY, a Corporation,

Appellees.

Brief for Appellant

STATEMENT OF THE CASE.

This is an appeal brought by the Standard Sanitary Manufacturing Company, a corporation, from a decision of the United States District Court for the District of

Arizona, in the case of Momsen-Dunnegan & Ryan, et al., petitioners for the involuntary bankruptcy of Phoenix Plumbing & Heating Company, a copartnership, consisting of Leo Francis, Lyon Francis and Dee Francis.

The decision of the United States District Court for the District of Arizona in question was based upon a report of R. G. Smith, Special Master, filed in the United States District Court for the District of Arizona on February 18, 1930.

On August 17, 1929, Momsen, Dunnegan & Ryan, Pratt-Gilbert Company, and the Union Oil Company, a corporation, filed a petition in the said court praying for the adjudication in bankruptcy of the said Phoenix Plumbing & Heating Company, setting up in said petition a number of alleged acts of bankruptcy, among which was the allegation that on or about the 5th day of June, 1929, the said Phoenix Plumbing & Heating Company had committed an act of bankruptcy by paying to the Standard Sanitary Manufacturing Company $13,000, money received by the said Phoenix Plumbing & Heating Company from the Lincoln Mortgage Company.

The Phoenix Plumbing and Heating Company conducted a plumbing, heating and sheet metal business. That is to say, they were engaged in the business of installing plumbing, heating apparatus, and sheet metal work in various buildings throughout Maricopa County, Arizona. In the year 1928 the said Phoenix Plumbing & Heating Company entered into an agreement with the Lincoln Mortgage Company, by the terms of which they

agreed to install heating and plumbing apparatus in a number of buildings then in construction or to be constructed by the Lincoln Mortgage Company. The material for these jobs, consisting of plumbing supplies, heating apparatus, etc., was purchased by the Phoenix Plumbing & Heating Company from the Standard Sanitary Manufacturing Company, which was at that time and now is a corporation engaged in the wholesale plumbing and heating supply business, dealing exclusively with retail plumbing concerns in the State of Arizona.

On the 5th day of March, 1929, the Phoenix Plumbing & Heating Company owed the Standard Sanitary Manufacturing Company some $30,000 for materials purchased and installed in various jobs, among which were the Lincoln Mortgage Company jobs. At that time the Phoenix Plumbing & Heating Company owed various accounts to the Crane Company, and to the Commercial National Bank of Phoenix for money loaned, but had as assets not only the usual equipment of a concern of that kind but also a large number of contracts partly finished, and in the course of execution on numerous public buildings and private residences in and about the City of Phoenix, Maricopa County, Arizona. The exact aggregate of these contracts on the 5th day of March, 1929, is not shown in the testimony, but it does appear from the evidence that the Phoenix Plumbing & Heating Company was then considered a going, solvent concern, with a very good line of credit, not only with the bank but with its various creditors.

The Standard Sanitary Manufacturing Company on that date received from the Phoenix Plumbing & Heating Company an assignment of its claim of all the moneys then due or to become due from the Lincoln Mortgage Company under the various contracts for the installation of plumbing apparatus and heating apparatus that the Phoenix Plumbing & Heating Company had with the Lincoln Mortgage Company. The assignment, which is respondent's Exhibit C in evidence, was in words and figures as follows:

"PHOENIX PLUMBING & HEATING COMPANY
316 North Sixth Avenue
Phoenix, Arizona

March 5th, 1929.

Standard Sanitary Mfg. Co.,
447 East Jefferson St.,

Gentlemen:

You are by this instrument authorized to draw on Lincoln Mortgage Co., of this city in the amount of Fourteen Thousand One Hundred Ninety Six Dollars Seventy Seven Cents ($14,196.77).

Which sum represents money due this firm for work and materials furnished in the construction of various houses and store buildings owned by the aforesaid Lincoln Mortgage Co.

This assignment effective this date.

PHOENIX PLUMBING & HEATING CO.
By D. Frances."

Thereupon this assignment was taken to the Lincoln Mortgage Company and accepted by that company. (Statement of Evidence, p. 419, and p. 335, 2nd par.)

Thereafter the Standard Sanitary Manufacturing Company continued to extend credit to the Phoenix Plumbing & Heating Company and delivered material to its various jobs up to the first week in August, 1929.

On or about the 5th day of June, 1929, the then manager of the Phoenix Plumbing & Heating Company, one Fryberger, and the manager of the Standard Sanitary Manufacturing Company, went to the Lincoln Mortgage Company and obtained from that company a check payable to the Phoenix Plumbing & Heating Company in the sum of $14,000. (Statement of Evidence, p. 442). Fryberger and the manager of the Standard Sanitary Manufacturing Company then went to the Citizens State Bank, upon which the check was drawn, and the check was cashed, the Citizens State Bank making in lieu thereof a check for $13,000 payable to the Standard Sanitary Manufacturing Company and a check for $1,000 payable to the Phoenix Plumbing & Heating Company.

After the petition in involuntary bankruptcy was filed the Standard Sanitary Manufacturing Company, within the time provided by the rules of the District Court, filed its answer to the involuntary petition, setting up therein, among other things, the assignment of the Lincoln Mortgage Company account to the Standard Sanitary Manufacturing Company on the 5th of March, 1929, and the acceptance by the Lincoln Mortgage Company of the said assignment and the payment according to the terms of said assignment on the 5th of June, 1929.

The Crane Company, another creditor, also answered the petition in involuntary bankruptcy, and thereafter the issues raised by the said petition and answers thereto were referred to Judge R. G. Smith, Refereee in Bankruptcy, as a special master to hear evidence on the same and report to the United States District Court. The hearings began on or about the 18th of November, 1929, and continued intermittently until January, 1930, and on the 18th of February, 1930, the said Special Master reported to the United States District Court. The said report declared the Phoenix Plumbing & Heating Company bankrupt and found as a matter of fact that they weer insolvent for the four months prior to the 17th day of August, 1929, and found, among other acts of bankruptcy:

> "16. That on or about June 10th, 1929, and within four months next preceding the filing of the petition herein, the said alleged bankrupts, Phoenix Plumbing & Heating Company, a copartnership, and Leo Francis, Lyon Francis and D. L. Francis, did, while insolvent, transfer and pay over to Standard Sanitary Manufacturing Company, a corporation, creditor, a portion of their property, to-wit, money in the sum of Thirteen Thousand ($13,000.00) Dollars with intent to prefer said creditor over their other creditors."

And upon the said finding of fact the Special Master found as a conclusion of law:

> "4. That the said alleged bankrupts and each of them did, on or about June 10th, 1929, and within

four months next preceding the date of filing of the involuntary petition herein, commit a further act of bankruptcy by transferring and paying over, while insolvent, to Standard Sanitary Manufacturing Company, a corporation, the sum of Thirteen Thousand ($13,000.00) Dollars in money."

From this finding of fact and conclusion of law the Standard Sanitary Manufacturing Company excepted to the United States District Court, which exceptions were argued before the said court on the 10th day of June, 1930, and a decision rendered sustaining the Master's report in toto. From this judgment the Standard Sanitary Manufacturing Company, appellant herein, appealed to this court, confining its appeal to the finding of fact and conclusion of law covering the so-called Lincoln Mortgage Company transaction, and the question of insolvency prior to the 20th day of July, 1929.

In making this appeal the Standard Sanitary Manufacturing Company did not file a supersedeas bond, but filed a cost bond in the sum of $1500 and thereafter entered into a stipulation with the attorney for the Trustee in Bankruptcy by the terms of which it was provided that the scope of the appeal of the Standard Sanitary Manufacturing Company was and is confined to the Lincoln Mortgage Company transaction, and the question of insolvency insofar as the same affects said transaction.

The Standard Sanitary Manufacturing Company did not at any time in the proceedings raise any question whatsoever as to the adjudication on the 17th of August,

1929, nor to the findings of fact and conclusions of law on other acts of bankruptcy save the Lincoln Mortgage Company transaction.

On the appeal the Standard Sanitary Manufacturing Company specified the portions of the record which it deemed necessary to enable this court to decide the question as to whether or not the Lincoln Mortgage Company transaction between the Phoenix Plumbing & Heating Company and the Standard Sanitary Manufacturing Company was an act of bankruptcy, and thereafter the atorney for the Trustee in Bankruptcy and the attorney for the petitioners in involuntary bankruptcy, namely, Momsen, Dunnegan & Ryan, Pratt-Gilbert Company, and the Union Oil Company, filed a praecipe for the inclusion in the record on appeal of all exhibits and of evidence pertaining to not only the question raised by the appeal, but the question of the partnership liability, the individual liability as bankrupts, the various acts of bankruptcy set up in the Master's report; in fact the whole record, which act on the part of counsel for the Trustee and for the petitioning creditors greatly increased the cost of said records and encumbered the same with a great mass of extraneous and irrelevant matter that was not and is not necessary for the decision of the question brought before this court by the appellants herein.

ASSIGNMENTS OF ERROR.

I.

The Court erred in overruling the objection of the Standard Sanitary Manufacturing Company to that por-

tion (517) of the Special Master's Report contained in Subdivision 16 of the Master's Findings of Fact on page 5 of said Special Master's report, which finding was in words and figures as follows:

> "16. That on or about June 10th, 1929, and within four months next preceding the filing of the petition herein, the said alleged bankrupts, Phoenix Plumbing & Heating Company, a copartnership, and Leo Francis, Lyon Francis and D. L. Francis, did, while insolvent, transfer and pay over to Standard Sanitary Manufacturing Company, a corporation, creditor, a portion of their property, to-wit, money in the sum of Thirteen ($13,000.00) Dollars with intent to prefer said creditor over their other creditors."

and to which find the following objection was made:

> "That said finding of fact has no foundation in the evidence submitted, because it appears affirmatively in the report of the evidence and by Respondent's Exhibit 'C' in the evidence that Phoenix Plumbing & Heating Company did on the 5th day of March, 1929, assign and set over to the Standard Sanitary Manufacturing Company all its right, title and interest to the money owed the Phoenix Plumbing & Heating Company by the Lincoln Mortgage Company on a certain contract which the Phoenix Plumbing & Heating Company then had with the Lincoln Mortgage Company, and that said assignment contained an order to the Lincoln Mortgage Company to pay to the Standard Sanitary Manufacturing Company all of the moneys owing or to become due from

the Lincoln Mortgage Company to the Standard Sanitary Manufacturing Company."

and that said objection as overruled was based on the following evidence in the case:

Respondent's Exhibit "C" in evidence, which is in words and figures as follows:

"March 5, 1929.

Standard Sanitary Mfg. Co.,
447 East Jefferson St.,
Phoenix, Arizona.

Gentlemen:

You are by this instrument authorized to draw on Lincoln Mortgage Company of this city in the amount of Fourteen Thousand One Hundred Ninety-six Dollars, Seventy-seven cents ($14,196.77),

Which sum represents money due this firm for work and materials furnished in the construction of various houses and store buildings owned by the aforesaid Lincoln Mortgage Company.

"This assignment effective this date.

"Phoenix Plumbing & Heating Co.,
By D. Francis."

(Marked Respondent's Ex. No. "C" in Evidence).

The Check of the Lincoln Mortgage Company was introduced in evidence, being Petitioners' Exhibit No. 34. This is a check for Fourteen Thousand ($14,000.00) Dollars drawn on the Citizens State Bank of Phoenix to the Phoenix Plumbing & Heating Company and endorsed on the back "Phoenix Plumbing & Heating Com-

pany, Cliff B. Fryberger, Mgr." All the evidence in the record on this subject is the testimony of Mr. Cliff Fryberger (Trans. Vol. 3, p. 391), beginning at line 27 and ending at line 27, page 392:

"Q. In regard to the amount of money paid by the Lincoln Mortgage Company, when was the date you went to work for the Phoenix Plumbing & Heating Company?

A. I think June 5th.

Q. And it was on that date that payment was made by the Lincoln Mortgage Company?

A. Several days later.

Q. Isn't it a fact that the way that was handled a check was made to the Phoenix Plumbing & Heating Company for $14,000?

A. Yes, sir.

Q. And the check was endorsed over by the Plumbing Company to the Standard Sanitary?

A. No sir. I went to the Citizens Bank and had two cashier's checks made, one for $13,000 and one for $1,000.

Q. Taken to the bank by yourself.

A. Yes.

Q. And you took in place thereof a check for $13,000 to the Standard Sanitary Company and a check for $1,000 to the Phoenix Plumbing & Heating Company.

A. Yes.

Q. So that $13,000 never went through the books of the Phoenix Plumbing & Heating Company?

A. It had to go through the books.

Q. You took the check?

A. It went through the books.

Q. Then your books showed a credit of $1,000 you received?

A. We had to show it to the credit of the Lincoln Mortgage Company to settle their account.

Q. And the Lincoln Mortgage Company account was assigned to the Standard Sanitary in March?

A. So I understand."

(Also the tstimony of Leo Francis, Vol. 1 Transcript, beginning at the top of page 172 and ending at page 173).

"Q. In your testimony yesterday you were asked about the Lincoln Mortgage Company claim; isn't it a fact that you gave the Standard Sanitary Manufacturing Company an order on the Lincoln Mortgage Company for all the money due on March 5th?

A. Dee gave them.

Q. But you knew about it?

A. Yes, I had heard them talk of it.

Q. It was agreeable to you that they should be given?

A. Yes.

Q. It was given on March 5th?

A. I couldn't say; it was in 1928.

Q. I hand you Respondent's Exhibit 'C' for Identification and will ask if yo uever saw that before?

(Witness examines paper.)

A. I would not say that I have seen it; but I talked with Mr. Bowers about it.

Q. You knew we had it?

A. Yes.

Q. The Lincoln Mortgage Company accepted it?

A. Yes.

Q. So that your interest in that amount of money ended there?

A. It was to apply on our account.

Q. So the truth of it was that in March, 1929, your books showed a debt of $45,000 reduced by the amount of that assignment, so far as the Standard Sanitary Company was concerned?

A. They gave us credit when they collected that $13,000.

Q. Your account was secured to that extent on the 5th of March and it increased your purchasing power to that extent, didn't it? It was their money from the time you turned that order over to them, wasn' it? A. Yes.

Q. The Phoenix Plumbing & Heating Company did not receive any money from the Lincoln Mortgage Company in June?

A. It was paid direct to the Standard Sanitary Company.

Q. On the 5th of March we all knew how much money was coming to you on that job?

A. Yes.

Q. And you knew how much of the Standard Material you were going to need to finish it, didn't you?

A. Yes.

Q. And in March it was collected, wasn't it?

A. You mean, the Lincoln Mortgage Company?

Q. Yes. A. Yes.

Q. When you gave this order to the Standard Sanitary, the work you were doing for the Lincoln Mortgage Company was pretty well cleaned up, wasn't it? A. Yes.

Q. There was only a little more labor and material to go in there?

A. Before that payment we done some work on some of the other jobs..

Q. That was labor, wasn't it?

A. Yes."

Also testimony of D. L. Francis contained in Volume 2 of the Transcript, page 329, to the effect which is as follows: (The testimony is in regard to Respondents' Exhibit "C" filed herein).

Q. I call your attention to Respondents' Exhibit 'C' for Identification; have you ever seen that before?

A. Yes, sir.

Q. Did you sign that? A. Yes.

Q. And delivered it to the Standard Sanitary Company?

A. Yes.

Q. On the 5th of March? A. Yes."

II.

The Court erred in overruling the objections of the Standard Manufacturing Company to that portion of the Special Master's report contained in subdivision 4 of the conclusions of law of the said Special Master's report, which is in words and figures as follows, to-wit:

"4. That the said alleged bankrupts and each of them did, on or about June 10th, 1929, and within four months next preceding the dateof filing of the involuntary petition herein, commit a further act of bankruptcy by transfering and paying over, while insolvent, to Standard Sanitary Manufacturing Com-

pany, a corporation, the sum of Thirteen Thousand Dollars ($13,000.00) in money."

for the following reasons:

"(1) That it affirmatively appears by the evidence in the case that the said $13,000.00 was assigned to the Standard Sanitary Manufacturing Company by the Phoenix Plumbing & Heating Company and the Lincoln Mortgage accepted such assignment on the 5th day of March, 1929, and that thereafter the Phoenix Plumbing and Heating Company had no control, interest or right in the said $13,000.00 and that the same was not transferred and paid over by the Phoenix Plumbing and Heating Company while insolvent on or about the 10th day of June, 1929.

"(2) Because it affirmatively appears by the testimony of D. L. Francis (Rep. Trans. Vol. 2, p. 329) and by the evidence of Fryberger (Rep. Trans. Vol. 3, pp. 391-392) and by Respondents' Exhibit 'C' in evidence, that full and complete title to the said $13,000.00 passed to the Standard Sanitary Manufacturing Company on the 5th day of March, 1929, and that there does not appear in the evidence, findings of fact or conclusions of law any proof that the Phoenix Plumbing and Heating Company was not a solvent, going concern on the 5th day of March, 1929."

III.

The Court erred in overruling the objections of the Standard Sanitary Manufacturing Company to that portion of the Findings of Fact of the Special Master's Re-

port contained in subdivision 5 of said Special Master's Report, which is in words and figures as follows:

> "3. That said Phoenix Plumbing and Heating Company, a copartnership, composed of Leo Francis, Lyon Rrancis and D. L. Francis, was at the date of filing of the petition herein, now is, and has been for more than four months next preceding the date of filing of the petition herein, insolvent."

for the reasons:

> "(1) That nowhere in the evidence upon which the said Master's Report, Findings of Fact and Conclusions of law are based does there appear any proof of insolvency prior to the 20th day of July, 1929, but that in truth and in fact the evidence contained in the Reporter's Transcript shows conclusively that at all times up to and including the 22nd day of June, 1929, the Phoenix Plumbing and Heating Company was a solvent, going concern and was so treated by all of its creditors, including the petitioning creditors herein, and that upon all the evidence the findings of insolvency should have been the 20th day of July, 1929.
>
> "(2) That the evidence of Jerry Lee, the auditor who testified in this case did not reveal insolvency on the part of these alleged bankrupts until the 30th day of April, 1929, as shown by the statement of assets and liabilities compiled by the said Jerry Lee and admitted in evidence as petitioning creditors' Exhibit No. 25, and for the further reason that the examination of the said Jerry Lee upon the said statement of assets and liabilities contained in Volume III of

the Transcript of Evidence, pages 400 to 523 revealed that the said statement is not a fair, equitable and just statement of the assets and liabilities of the said alleged bankrupt."

ARGUMENT.

Assignments of Error I and II are based upon the proposition that the $13,000 paid to the Standard Sanitary Manufacturing Company on or about the 10th of June, 1929, had become the property of the Standard Sanitary Manufacturing Company on the 5th day of March, 1929, more than four months prior to the date of adjudication in bankruptcy of the Phoenix Plumbing & Heating Company.

As set forth in the statement of facts herein, it is the contention of appellant that all of the title the Phoenix Heating & Plumbing Company had to that certain fund in the hands of the Lincoln Mortgage Company, being the balance due the Phoenix Plumbing & Heating Company for work performed upon a number of buildings for the Lincoln Mortgage, had passed to the Standard Sanitary Manufacturing Company on the 5th of March, 1929, by virtue of the assignment which is set forth in the statement of facts herein, and is Respondents' Exhibit C in Evidence.

This assignment constituted not only an assignment but an order to the Lincoln Mortgage Company for the sum of $14,196.77, and, as stated in the said assignment, that sum represented money due the Phoenix Plumbing

& Heating Company for work and materials furnished in the construction of various houses and store buildings owned by the aforesaid Lincoln Mortgage Company. From the 5th day of March, 1929, the Phoenix Plumbing & Heating Company had no jurisdiction whatsoever over this money and had no right to draw on the same or demand any portion thereof from the Lincoln Mortgage Company. The court will note that the testimony of Leo Francis, who claimed to be the proprietor of the business, and who, according to all the evidence, was clearly one of the partners, was to the effect that the Lincoln Mortgage Company accepted this assignment on the 5th day of March (Statement of Evidence, p. 335). This evidence of acceptance on the part of the Lincoln Mortgage Company was not repudiated by any evidence produced by the petitioning creditors, so that insofar as the assignment and order contained in Respondent's Exhibit C is concerned, we have an assignment by the Phoenix Plumbing & Heating Company to the Standard Sanitady Company on the 5th day of March of a definite liquidated amount in the hands of the Lincoln Mortgage Company. In other words, a specific fund to which full title and right was transferred from the Phoenix Plumbing & Heating Company to the Standard Sanitary Manufacturing Company on the 5th day of March.

Applying the fundamental test of bankruptcy law to this transaction, the question is asked, could the Phoenix Plumbing & Heating Company at any time after the 5th day of March, 1929, exercise any right, control or claim upon the $14,000 assigned in Respondent's Exhibit C,

or could any representative, successor or assignee of the Phoenix Plumbing & Heating Company make any claim or exercise any right over the said fund after the execution of said assignment? It is our contention that under the law laid down by the United States Supreme Court and the Circuit Courts of Appeal of the various circuits of the country, neither the Phoenix Plumbing & Heating Company nor any of its successors in interest, and in particular its Trustee in Bankruptcy, had any jurisdiction, interest or control over the sum of money so assigned after the 5th of March. Reverting again to the facts in the case, we wish to call the court's attention to the way this money was handled when the various jobs were completed and the Lincoln Mortgage Company was ready to pay therefor—Fryberger, the then Manager of the Pheonix Plumbing & Heating Company, and Nihell, the Manager of the Standard Sanitary Manufacturing Company, went to the Lincoln Mortgage Company and received a check which was made payable to the Phoenix Plumbing & Heating Company but delivered to these two men, who thereupon went to the bank upon which the check was drawn and deposited the same, and by mutual agreement two cashier's checks were drawn, one for the $13,000 to the Standard Sanitary Manufacturing Company, and the balance, one thousand and odd dollars, to the Phoenix Plumbing & Heating Company. As it appears in the testimony, the Standard Sanitary Manufacturing Company permitted this disposition of the money so as to save the Phoenix Plumbing & Heating Company in its payroll (p. 442 Statement of Evidence).

In the rule which we insist governs the situation here, is set forth the following:

> "The transfer must be of such a nature that the fundholder can safely pay and is compellable to do so, though forbidden by the assignor. When the transfer is of the character described the fundholder is bound from the time of notice."
>
> *Christmas v. Gaines et al,* 81 U. S. Sup. Ct. Rep. 69-84, 20 L. Ed. 762.

And again in the same case the court held:

> "But an order to pay out of a specified fund has always been held to be a valid assignment in equity and to fulfill all the requirements of the law."

In the above entitled case the court draws the clean-cut distinction between an agreement to pay out of a particular fund which is not an equitable assignment and an actual transfer of all right and title to a specified fund so that the fundholder is obliged to pay according to the terms of said transfer. The court will bear in mind that in the instant case it is not a check; it was not a note; it was an order upon and an assignment of all the money in a specified fund in the hands of a definite party, which said order was accepted by the party holding the fund. Again the court laid down the rule under different circumstances as follows:

> "A mere promise, though of the clearest and most solemn kind, to pay a debt out of a particular fund,

> is not an assignment of the fund, even in equity; but, to make an equitable assignment, there should be such an actual or constructive appropriation of the subject-matter as to confer a complete and present right on the assignee, even where the circumstances do not admit of its immediate exercise and to divest the assignor of control over the fund."

Smedley et al v. Speckman, 157 Fed. 815.

Again, in the case of *In re McLoon,* where a woman executed a mortgage to her son more than four months prior to the bankruptcy, and which mortgage was not recorded until long after the four months preceding the petition in bankruptcy had begun to run, the court held that the conveyance was made in good faith to secure aid and to secure further advances, and that the alleged bankrupt believed herself to be solvent at the time, and, therefore, the assignment or mortgage was held good and not an act of bankruptcy.

In re McLoon, 162 Fed. 575; see also
In re Harvey, 212 Fed. 340.

In the last named case the question before th court was the distinction between an actual pledge and an agreeeement to give a pledge. In the instant case we have something not a pledge; we have an absolute transfer of title made on the 5th of March, more than five months prior to the adjudication in bankruptcy. Referring to the decision of the court in the McLoon case, supra, as to solvency or insolvency appearing there, the

question of the insolvency of the alleged bankrupts in the present case will be discussed more fully under the third assignment of error, but we contend that in the instant case there was no real evidence of insolvency at any time prior to the 20th of July. Up to that time the alleged bankrupts, and all of their creditors, considered and treated the Phoenix Plumbing & Heating Company as a solvent, growing concern, and the facts in the record on this proposition will be discussed more fully under our assignment of error No. 3.

It will be contended that this assignment was a secret one and in defraud of the creditors, but we call the court's attention to the fact that the allegation of the petitioning creditors petition in involuntary bankruptcy covering this transaction, is not that the transfer was made with intent to hinder, defraud or delay creditors, as set forth in the Act of Bankruptcy under subdivision 1 of subsection (a), but is brought under subdivision 2 which makes an act of bankruptcy of the transfer while insolvent of any portion of his property to one or more of his creditors, with intent to prefer such creditor over his other creditors. Under the later allegation this case must stand or fall, and we submit that there is not one scintilla of evidence to the effect that at the time the assignment was made on the 5th day of March did there appear any intent on the part of the Phoenix Plumbing & Heating Company to prefer the said creditor over any other, but that on the contrary the assignment was made to pay a portion of a then existing debt and to secure future credit from the particular creditor. At the time this assignment was

made the Phoenix Plumbing & Heating Company owed some money to the bank and small amounts to various creditors, the largest individual creditor at that time being the Standard Sanitary Manufacturing Company; but it also appears that at the time the assignment was made the potential assets of the Phoenix Plumbing & Heating Company exceeded by a large amount its liabilities. It had a large number of contracts for the installation of plumbing in public buildings. All of these jobs were bonded and there was ample security at that time for all of its debts; in other words, at the time of the assignment on the 5th of March the Phoenix Plumbing & Heating Company was a solvent, going concern, within the meaning of the Bankruptcy Act, which situation will be more fully shown under the succeeding assignment. Again, the Circuit Court for the District of Oregon held that where a contract was entered into between an alleged bankrupt and a creditor by the terms of which the bankrupt agrees to transfer certain property specifically named, in consideration of the advancement of money by the other party to the contract, and the said contract of transfer was not carried out until after the four months prior to the adjudication in bankruptcy had begun to run, such a transaction did not constitute a preference.

Sabin v. Camp, 98 Federal 974.

The court will bear in mind that the allegation of the petitioning creditors was that this act which they claim was an act of bankruptcy was done with the intent to prefer, hence if under the law the assignment of the Lincoln

Mortgage Company was not a preference it is not an act of bankruptcy.

Again, the Circuit Court of Appeals in the Sixth District held—

> "Where complainant purchased a quantity of lumber, to be manufactured and shipped to it by the bankrupt, advancing large sums before the lumber was sawed, complainant acquired an equitable lien on lumber piled in the yards of the bankrupt and intended to be applied on complainant's contract for the balance of advances, etc., which was enforceable as against the bankrupt's trustee."

Gage Lumber Co. v. McEldowney, 207 Fed. 255.

The analogy of the foregoing case and the case at bar is very clear. In the instant case the Standard Sanitary Manufacturing Company advanced and was advancing large amounts of material to the Phoenix Plumbing & Heating Company to be installed in various jobs the Phoenix Plumbing & Heating Company then had under contract. To secure past advances and to secure future advances of material the Phoenix Plumbing & Heating Company gave the assignment of the money in the hands of the Lincoln Mortgage Company and which was due or would become due the Phoenix Plumbing & Heating Company. There was no intent to prefer. It was simply a transaction such as appeared in the Gage Lumber Company case against McEldowney, supra; hence, under the above cases it cannot be held that this assignment was made with intent to prefer.

See also *Fourth Street National Bank v. Yardley,* 165 U. S. 633; 41 L. Ed. 855.

Mr. Justice White (afterwards Chief Justice of the Supreme Court), in delivering his opinion in the above cited case, used this language:

> "That the owner of a chose in action or of property in the custody of another may assign a part of such rights, and that an assignment of this nature, if made, will be enforced in equity, is also settled doctrine of this court." (Citing a large number of cases).
>
> "Whilst an equitable assignment or lien will not arise against a deposit account solely by reason of a check drawn against the same, yet the authorities establish that if, in the transaction connected with the delivery of the check it was the understanding and agreement of the parties that an advance about to be made should be a charge on and be satisfied out of a specified fund a court of equity will lend its aid to carry such agreement into effect as against the drawer of the check, mere volunteers, and parties charged with notice."

It will be noted that in the above citation appear the words "parties charged with notice." In this connection we wish to call the court's attention to the fact that there is no provision in the state laws of Arizona by which assignments of the nature of the instrument introduced in evidence in this case as respondent's Exhibit C, as set forth above, are required to be recorded. It is not a chattel mortgage; it is not an assignment for the benefit of creditors; it is a transaction between three parties, in

this case the Phoenix Plumbing & Heating Company, the Standard Sanitary Manufacturing Company, and the Lincoln Mortgage Company. The Standard Sanitary Manufacturing Company had express notice, the Lincoln Mortgage Company accepted the assignment, and the Phoenix Plumbing & Heating Company made it; hence, all three were parties, and the Trustee in Bankruptcy of the Phoenix Plumbing & Heating Company is bound by and charged with every equity and notice that the Phoenix Plumbing & Heating Company had. Hence, if the Trustee in Bankruptcy could not obtain control over the subject matter of the assignment by virtue of any right the Phoenix Plumbing & Heating Company had in the same, then the transaction was not a preference and not an act of bankruptcy under the specific allegation of the petitioner's bill, upon which this whole bankruptcy matter is based. To constitute this transaction an act of bankruptcy there must have been an intent to prefer one creditor over another, and we submit that as to the time of this assignment there is not one bit of evidence in the record to show any intent on the part of the Phoenix Plumbing & Heating Company to prefer a creditor. Again, in the District Court of Pennsylvania, the following decision in a case where an order was given in the following language:

> "Please pay to the order of . . . . the sum of . . . . . out of any balance due us remaining in your hands."

operated as an equitable assignment of that part of the

fund designated in the order, and in deciding the case the court used the following language:

> "The conditions required to constitute an effective assignment are that the fund shall be designated, and the order to pay unconditional. The language of this letter is sufficiently specific on these points, under the decisions of the Supreme Court of the United States and the Supreme Court of this state."

In re Hanna, 105 Fed. 587.

Practically all of the elements in the case at bar are present in the case of *In re Hanna,* and a careful check of later cases reveal that the case of *In re Hanna,* supra, is still the law in Federal jurisdiction.

See also, on the question of what constitutes an equitable lien good as against the claims of a trustee in bankruptcy, the case of *Fee-Crayton Hardware Co. v. Richardson Warren Co.,* 18 Fed. (2nd) 617. See also note at bottom of page 865 in Book 41 L. Ed.:

> "Every express executory agreement in writing, whereby the contracting party sufficiently indicated an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands not only of the original contractor, but of his heirs, administrators, executors,

voluntary assignees and purchasers, or encumbrancers with notice."

See note bottom page 866, 41 L. Ed. in connection with the case of *Walker v. Brown.*

There is no question but that the assignment made by the Phoenix Plumbing & Heating Company to the Standard Sanitary Manufacturing Company on the 5th day of March, 1929, had all of the necessary elements of an equitable lien under federal practice, and under the cases cited above the enforcement of that lien, even when made within four months of the adjudication of of bankruptcy, was good as against the trustee in bankruptcy and the creditors of the bankrupt estate.

See *Fee-Crayton v. Richardson et al,* supra, in which the federal courts held that the authority for the creation of an equitable lien arose out of the federal constitution and was not amenable to state laws. The above doctrine as enunciated was applied in the case of *In re Stiger,* 202 Fed. 791 (Bankruptcy case). In that case the bankrupt was adjudicated a bankrupt in involuntary proceedings instituted against him on the 8th day of June. An assignment had been executed the 17th day of January of the book accounts of the alleged bankrupt. The holder of the assignment petitioned to assert his right to the accounts on the ground that the same were assigned more than four months prior to the adjudication in bankruptcy. The court applied the test laid down in the above cited case, using this language:

"Where enforcement of an agreement to assign is sought, it is essential that there was a purpose to presently transfer all that the assignor had or was to obtain in the funds or accounts which are the subject of the transaction. The sure criterion is whether the transaction between the parties, if assented to by the debtor of such alleged assignor, creates an absolute personal indebtedness payable by him to such alleged assignee, or whether it creates merely an obligation by such assignor to make payment out of that particular debt. If the former, an equitable property in the debt, and not a mere right of action against such primary debtor, passes to such assignee, and an equitable assignment is effected."

In re Stiger, 202 Fed. 791.

In the Stiger case the facts did not stand up to the test applied in the foregoing quotation, but we submit that in the instant case every element required by the test set forth by the court in the Stiger case is met. On the 5th of March an absolute assignment and an order upon the Lincoln Mortgage Company for all moneys then due or to become due the Phoenix Plumbing & Heating Company was made to the Standard Sanitary Manufacturing Company and accepted by the Lincoln Mortgage Company. These are all the elements required to make an assignment good as against the trustee in bankruptcy of the Phoenix Plumbing & Heating Company.

See also *United States v. D. L. Taylor Co.,* 268 Fed. 635.

Again, in the District Court of Massachusetts, in the case of *In re Theodoropulos,* 11 Fed. (2nd) 909, Judge Morton held as follows:

> "A mere promise, though of the clearest and most solemn kind, to pay a debt out of a particular fund, is not an assignment of the fund, even in equity. To make an equitable assignment, there should be such an actual or constructive appropriation of the subject-matter as to confer a complete and present right in the party meant to be provided for, even where the circumstances do not admit of its immediate exercise." (Quoting *Smedley v. Speckman,* 157 Fed. 815).

The learned judge, then proceeding to apply the test laid down in the above quotation to the case before him, held that that case constituted at best a mere promise to convey, but in the instant case there was no promise—there was an immediate assignment of all right, title and interest in the fund in the hands of the Lincoln Mortgage Company.

> See also the case of *McDonald et al v. Daskan,* 116 Fed. 276.

In that case an equitable assignment of the proceeds of a fire insurance policy as collateral security for a loan was made more than four months prior to the adjudication in bankruptcy, and the actual delivery of the policies was made after a fire had occurred and within four months of the adjudication in bankruptcy, and the Circuit Court of Appeals of the Seventh Circuit held that

the assignment was good as against the trustee in bankruptcy and did not constitute an unlawful preference and an act of bankruptcy. Much the same situation exists in the instant case. The assignment was made, and if the jobs which the Phoenix Plumbing & Heating Company had performed and was performing for the Lincoln Mortgage Company were completed on the 5th of March, the money would have been paid as of that date, but it did not become available until June, as in the case cited above the proceeds of the fire insurance policies did not become available until after the fire. In both cases the actual payment of the money was made within the four months, and we submit that the case cited above is clearly in point and decisive of the question raised under this assignment of error.

See also the case of *Hurley v. A. T. & S. F. R. R.*, 213 U. S. 126; 53 L. Ed. 729.

which holds that the advancing of materials and money may be secured by an equitable lien and the same satisfied within the four months prior to bankruptcy.

In the case of *Union Trust Co. v. Bulkeley*, 150 Fed. 519, the Circuit Court of Appeals of the Sixth Circuit held that—

> "A parol assignment by a man in business of the accounts and bills receivable which he should acquire in the course of such business to secure a person for becoming his indorser to enable him to raise money for use in the business creates a valid lien as against

> the assignor's trustee in bankruptcy where the assignment was made in good faith, although no notice of the same was given to creditors, and the notes and accounts remained in the possession of the assignor until his bankruptcy."

In that case the court apparently examined the statutes of the State of Michigan, in which the subject matter of the case arose, and found that the laws of the state were silent on the question of such assignments and held that it was a good assignment and that the same did not constitute a preference and gave the trustee in bankruptcy no rights in the subject matter of the assignment. It will be noted in that case that the accounts remained in the hands of the bankrupt up to the date of his adjudication.

ASSIGNMENT OF ERROR No. 3.

Assignment of Error No. 3 is based upon the proposition that all of the evidence introduced before the Special Master, whose report was confirmed by the judge of the District Court in an order confirming the same and adjudicating the Phoenix Plumbing & Heating Company a bankrupt, is based upon the proposition that the insolvency of the Phoenix Plumbing & Heating Company was not established by the evidence as of the 17th of April, 1929, or any date prior thereto. To narrow the scope of the foregoing proposition, we will at the outset state that there is no clear indication of insolvency up to the very date of the adjudication. As is shown in the record filed herein, a receiver was appointed

by the District Court on the 17th day of August, and at or about the 17th of August those jobs which were bonded and upon which the Phoenix Plumbing & Heating Company had been working up to that time, were taken over by the various bonding companies. There is a statement of the financial condition of the Phoenix Plumbing & Heating Company in evidence as of July 20, 1929, being petitioner's Exhibit No. 35, which shows some indication of insolvency as of that date. It is true that Mr. Jerry Lee, the auditor who testified for the petitioning creditors, attempted to show by two statements, one dated April 30, 1929, and appearing in the record as petitioner's Exhibit No. 25 in evidence, that the bankrupt was insolvent on the dates named. This statement sets up a deficit of $30,165.82 in the assets of the concern, and this deficit was arrived at by the auditor under circumstances which tend to show that it was just a guess upon the part of the auditor.

In order that the court may have the full picture of the situation, as it appeared at the time of the hearing before the Special Master, we wish to cite the facts surrounding this financial statement of April 30, 1929, prepared by the Southwest Audit Company. Mr. Lee, of the Southwest Audit Company, was retained by the petioning creditors to make an audit of the Phoenix Plumbing & Heating Company's books after the petition in involuntary bankruptcy had been filed. Some time in August, 1929, Mr. Lee had been retained by a number of bonding companies to audit the books of the Phoenix Plumbing & Heating Company to enable them to settle

with the material men who had claims against the bonds of the company arising out of materials furnished to the various bonded jobs upon which the Phoenix Plumbing & Heating Company had been working. Mr. Lee in his work for the bonding companies had access to the books of the Phoenix Plumbing & Heating Company and also had access to the books of the various creditors, concerns who had furnished plumbing supplies and materials to the Pheonix Plumbing & Heating Company and which had been incorporated in the buildings covered by the bonds of the various surety companies who employed Mr. Lee. With this material Mr. Lee was able to obtain a very accurate and clear-cut statement of the amounts due on the various jobs, the amount of money paid the Phoenix Phoenix Plumbing & Heating Company, and upon his figures the bonding companies were able to make satisfactory settlements with the material men involved.

But when Mr. Lee was retained by the petitioning creditors to make up the financial statement of the Phoenix Plumbing & Heating Company for use in the hearing, he disregarded the vast amount of data he had collected for use with the bonding companies and proceeded to make up statements for the petitioning creditors which would show insolvency. And to obtain this result Mr. Lee, by his own admissions in his cross-examinations by counsel for the Standard Sanitary Manufacturing Company, admitted that he had disregarded the information which he had obtained for the bonding companies and which if used in his testimony and in his statements

which appeared in petitioners' Exhibit No. 25 would have made a material difference in the total of assets and potential assets of the Phoenix Plumbing & Heating Company.

As will appear in the Statement of Evidence, on April 21, 1929, an explosion in the office of the Phoenix Plumbing & Heating Company took place. Attempts were made by attorneys for petitioning creditors to show that this explosion was caused by one or more of the copartners of the Phoenix Plumbing & Heating Company. Suffice it to say that the Phoenix Police Department made an examination of the situation and took no action in the matter whatsoever. Two of the books of the alleged bankrupt disappeared after the explosion, a cash book and a ledger. All of the partners in the Phoenix Plumbing & Heating Company denied any knowledge whatsoerer of the explosion, though they could not account for the missing books. Mr. Jerry Lee, in his testimony, tried to make out that the absence of these two books were the cause of his being unable to make a more satisfactory statement of the condition of the Phoenix Plumbing & Heating Company, although he admitted in his cross-examinations that the books he used in arriving at the audit were probably more than he needed. (Statement of Evidence, p. 513).

In arriving at the financial statement of April 30th, which was made in October, 1929, Mr. Lee admitted in cross-examination that, although there was available to him figures which would give an accurate statement of

the total amount of money which was due and payable and to become due and payable to the Phoenix Plumbing & Heating Company as of April 30, 1929, and that there was available to him facts and figures which would show the amountof money which was actually received by the Phoenix Plumbing & Heating Company after April 30, 1929, yet he gave no credit whatsoever for the amounts of money which upon the face of it were due and payable, with all work completed or practically all work completed on April 30, 1929. In arriving at the liabilities Mr. Lee set up every cent of the amounts due the Standard Sanitary Manufacturing Company, the Crane Company, and other material houses for materials furnished to the Phoenix Plumbing & Heating Company, and although Mr. Lee could and did trace every bit of material furnished by the Standard Sanitary Manufacturing Company to the city hall job in the amount of some sixteen thousand dollars, yet he made no attempt to give any credit whatsoever to the Phoenix Plumbing & Heating Company for materials which appeared as liabilities in the assets of the Phoenix Plumbing & Heating Company, though he could have traced the material to the various jobs. In fact Mr. Lee did trace the material from the Standard Sanitary Manufacturing Company to the various jobs which were covered by the bonds of the surety companies who retained him in August for that purpose, yet, in making up his statements which were submitted in evidence before the Special Master, he deliberately disregarded all of this work which he had done in tracing this material to the various jobs and did not give credit for the amounts of money that were due

and payable to the Phoenix Plumbing & Heating Company from these various jobs on April 30, 1929. In other words, this statement of Mr. Lee (petitioners' Exhibit No. 25), dated April 30, 1929, charged as a liability all of the cost of materials furnished by the various material houses, and then deducted $30,165.82 of these materials charged as liabilities from the assets; so that it is our contention that the financial statement of April 30, 1929, charges as liabilities the sum of $62,059.73, being the material furnished by various material houses and incorporated in the jobs which were listed as contracts receivable in the assets, and that $30,165 worth of the same materials, already fully charged in the liabilities, were deducted from the contracts receivable by Mr. Lee.

If Mr. Lee had given credit on the contracts receivable for this amount then his statement would show that on the 30th of April, 1929, the Phoenix Plumbing & Heating Company was a solvent, going concern. In Mr. Lee's cross-examination he admitted that he found various amounts of money due the Phoenix Plumbing & Heating Company which he did not credit in the asset column. On page 527 of the Statement of Evidence he admitted that there was $8,000 due on the city hall job, and various amounts on the other jobs, yet admitted that he did not put them in as assets of the company. He admitted that the bonding companies collected these moneys from the owners of the buildings as they took the jobs over, and yet with all this evidence of facts and figures before him he disregarded the same and charged the materials billed to the Phoenix Plumbing & Heating Com-

pany as liabilities and then deducted fifty per cent of that amount from the assets for the purpose of showing a deficit. We submit, therefore, that Mr. Lee's statement is not proof of insolvency, and that as a matter of fact the first evidence of insolvency on the part of the Phoenix Plumbing & Heating Company that appears in the record was in the statement of July 20, 1929, and that that statement was the only one based upon actual facts and figures having been compiled by the joint efforts of the bookkeeper, the Commercial National Bank cashier, the manager of the Standard Sanitary Manufacturing Company, and the manager of the Phoenix Plumbing & Heating Company, but at no time prior to that date does there appear any real evidence of insolvency. Now, the rule developed in bankruptcy cases by the United States courts applied to the foregoing acts shows clearly that the allegation of the petitioning creditors of insolvency and the finding of the Master that the Phoenix Plumbing & Heating Company was insolvent for more than four months prior to the 17th of August, 1929, are not borne out by the facts.

In the early case of *Rome Planing Mill,* 96 Fed. 812, the court held that the burden of proof is on the petitioning creditors to establish the insolvency where the allegation of an act of bankruptcy is under the provision of subdivision 2, and goes on to say that the burden is upon the petitioner to show such insolvency as of the date of the transfer. In the instant case the bankrupt firm by its members, the three partners, appeared and submitted themselves to examination and delivered up all of their

books except those destroyed by the explosion. They denied any participation in the explosion, and no proof was adduced to tie them to the explosion. Hence, under the ruling case the burden was upon the petitioners to prove insolvency as of the date of the transfer. Under the facts as they appear in the record there is no proof of insolvency until July 20th, at the earliest, and regardless of what action the court might take as to the equitable assignment and transfer of March 5th of the Lincoln Mortgage Company, and even if it be held that the actual transfer took place on the 10th of June, still we submit that under the authority of the ruling case, supra, the proof of insolvency was not made until the 20th of July. As to the question of what constitutes insolvency, the cases are very clear as to the test which must be applied. It is not a question of how much cash could be realized at the moment that decides the question of insolvency, it is, Would the fair market value of the property equal the amount of debts?

Dundan v. Landis, 106 Fed. 839, at p. 858.

The only evidence that appears in the record as to what the actual value of the contracts receivable were at any time up to July 20th is in the statement of Leo Francis, who in his testimony stated that he believed that if he could liquidate and turn into cash his contracts receivable at any time prior to adjudication of bankruptcy, there would have been more assets than liabilities in the Phoenix Plumbing & Heating Company (Statement of Evidence, p. 341); so, too, where the alleged bankrupt be-

lieves that he is solvent and acts accordingly he rebuts the assumption of an intent to prefer which arises from an act of insolvency. See

In re Gilbert et al, 112 Fed. Repr. 951—

> "Insolvency is no longer inability to pay debts in the regular course of business, but exists only 'whenever the aggregate of (the bankrupt's) property, exclusive of any property which he may have conveyed, transferred, concealed or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not at a fair valuation be sufficient in amount to pay his debts.' "

In re Pettingill, 135 Fed. Repr. 218.

Again, another test of insolvency is contained in the following language:

> "On issue of insolvency, fair reasonable value of alleged bankrupt's property is to be determined from evidence as of date of alleged act of bankruptcy, and not from subsequent history of property."

In re Cleveland Discount Co., 9 Fed. (Second) 97.

We wish to call the court's attention again to the attempt made to show insolvency on April 30th by Mr. Lee. If his statement had shown all amounts of money due and payable, or to become due and payable, by virtue of the contracts receivable on April 30, 1929, and if he had given credit on the assets side of the ledger for all of the materials which could be traced to the various

buildings, and evidence had been submitted of the fair value thereof as of April 30, 1929, the statement then would show that the assets exceeded the liabilities, but this statement which does show a deficit of $30,000 was made upon an erroneous juggling of figures, in that all material furnished was set up as liabilities, and instead of giving a credit on the assets side for these materials still in the control of the Phoenix Plumbing & Heating Company and for which they were entitled to payment from the owners of the buildings in which they were incorporated, he deducted $30,000 from these contracts receivable, which in effect were but statements of the material and labor furnished in these various buildings from the assets; in other words, all liabilities were set up at one and one-half times their actual value, while the assets and potential assets were set up at one-half their actual value. As to the true test of insolvency see—

In re Chappell, 113 Fed. 545.

There the court held that the test was whether or not the aggregate property assets of the alleged bankrupt exceeded his liabilities at the time in question. See also—

In re Crystal Ice & Fuel Co., 283 Fed. 1007,

in which Judge Bourquin wrote the opinion and in which the question of what constitutes insolvency under the Bankruptcy Act is discussed at length, holding that the evidence must be clear as to whether or not the insolvency upon which the petition in bankruptcy is predicated is in-

solvency as defined under the Bankruptcy Act, or other forms of insolvency. As to the burden upon the petitioning creditors to show insolvency, see also—

Mansfield Lumber Co. v. Sternberg,
38 Fed. Repr. (Second Series) 615.

The rule laid down in the circuit courts as to when insolvency must be shown is contained in the following cited cases, which hold to the following test:

> "In determining the question of the solvency of a bankrupt, who conducted and owned the furniture in a hotel, at the time he executed a mortgage to a creditor claimed to be preferential, his property must be valued as that of a going concern, and not what it was worth as dead property after bankruptcy had intervened."

In re Klein, 197 Fed. 241.

In re Marine Iron Works, 159 Fed. 753, again—

> "The question of insolvency must be decided as of time before bankruptcy when the bankrupt was in charge of the business."

In re Bucyrus Road Machinery Co. v. Edsinger,
10 Fed. (2nd) 333.

As was stated heretofore in this brief, the first time that any clear-cut proof of insolvency appears in the record herein was on July 20th, and that proof is not sufficient to show insolvency at the time of the assign-

ment of the Lincoln Mortgage Company money as set forth hereinabove. Proof that a man was insolvent on a certain day is not proof tthat he was insolvent on a day prior thereto. Many contingencies, such as unwise investments, losing contracts, etc., might happen to reduce a person from a state of solvency to one of insolvency within a short space of time.

Kimball v. Dresser, 57 Atl. 787;
In re Chappell, 113 Fed. 545;
B. F. Goodrich Rubber Co. v. Valley Lbr. Co., 267 S. W. 1036.

Again, the exact time of insolvency must be shown, for it has been held that a finding of insolvency at some time between the years 1907 and 1915, but no definite date in that period, cannot be used affirmatively to establish insolvency in 1915.

Millard v. Green, 110 Atl. 177.

It is our contention that the statement contained in the Master's Report to the effect that the Phoenix Plumbing & Heating Company was insolvent for a period of more than four months prior to the 17th day of August, is not based on the record, as there does not appear any evidence of insolvency prior to July 20th, 1929, which was not four months prior to the date of adjudication. It is our contention that a careful analysis of the two financial stamtamsnets made by Jerry Lee (petitioners' Exhibit No. 25 in evidence) which purport to show the financial condition of the Phoenix Plumbing & Heating

Company on April 30th and August 17th, would show upon their face that the said statements do not contain the true facts and figures. An examination of the cross-examination of Jerry Lee in the Statement of Evidence shows admission after admission on the part of Lee to the effect that he did not use all of the facts and figures available; that he totally disregarded the figures which show assets due and collectible to the Phoenix Plumbing & Heating Company both on the 30th day of April, 1929, and the 17th day of August, 1929; that he took the condition of the bankrupt firm in October and using that as a basis built up these two statements purporting to show its condition at dates a long time prior thereto; that he very carefully included all liabilities and gave no counter-credits for the same in the assets, and then deducted from the assets sufficient amount to make a deficit appear, and finally his admission that the whole thing was an estimate based upon his very evident desire to show the concern insolvent from April 30th on. We submit that the petitioners did not sustain the burden of proving insolvency as of the time of the Lincoln Mortgage Company assignment took place and that the finding of the Master to the effect that this transfer was made at a time when the Phoenix Plumbing & Heating Company was insolvent, is not sustained by the evidence before him.

CONCLUSION.

The appellant herein respectfully submits that on the 5th day of March, 1929, so far as the record in this case shows, the Phoenix Plumbing & Heating Company was

a solvent, going concern; that on that date the transfer by an assignment in writing of all the right, title and interest in and to the $14,000 owing and to become due to it from the Lincoln Mortgage Company to the Standard Sanitary Manufacturing Company, which said assignment was accepted by the Lincoln Mortgage Company, and that at that time it lost all right, control and right to possession of the said fund, and that the payment of said fund as recited in the evidence on the 10th day of June, 1929, was not a transfer made with intent to prefer one creditor over another but was a payment to the Standard Sanitary Manufacturing Company of an obligation which the Lincoln Mortgage Company had owed and been liable to the Standard Sanitary Manufacturing Company for, from and after the 5th day of March, 1929; and that the finding of the Special Master that the said transfer hereinabove described was an act of bankruptcy, was contrary to the evidence in the record and also to the law governing such action, and that this appellant is entitled to a decision by this honorable court to that effect. That the ruling of the federal court that the said Special Master's report was correct and confirming the same was error, and that this appellant is entitled to a decision declaring said transaction to be not an act of bankruptcy, not an act made with intent to prefer one creditor over another, and that its costs herein expended be taxed against the petitioning creditors and the trustee in bankruptcy.

Respectfully submitted,

ARMSTRONG, KRAMER, MORRISON & ROCHE,

Attorneys for Appellant.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

STANDARD SANITARY MANUFACTURING COMPANY, a Corporation,

Appellant,

v.

MOMSEN-DUNNEGAN-RYAN COMPANY, a Corporation; PRATT-GILBERT HARDWARE COMPANY, a Corporation; UNION OIL COMPANY OF ARIZONA, a Corporation; PHOENIX PLUMBING AND HEATING COMPANY, a Copartnership Composed of LEO FRANCIS, LYON FRANCIS and D. L. FRANCIS, Copartners; LEO FRANCIS, LYON FRANCIS and D. L. FRANCIS, as Individuals; WILLIAM L. HART, as Trustee in Bankruptcy of the Phoenix Plumbing and Heating Company, a Copartnership Composed of LEO FRANCIS, LYON FRANCIS and D. L. FRANCIS, copartners, Bankrupts, and CRANE COMPANY, a Corporation,

Appellees.

No. 6416

MOTION OF APPELLEES, TO DISMISS OR AFFIRM
and
BRIEF AND ARGUMENT ON SAME

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA.

ALICE M. BIRDSALL,
THOMAS W. NEALON,
Attorneys for Appellees.

THE MANUFACTURING STATIONERS INC., PHOENIX, ARIZONA

TOPICAL INDEX

CASES CITED

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

STANDARD SANITARY MANUFACTURING COMPANY, a Corporation,

Appellant,

v.

MOMSEN-DUNNEGAN-RYAN COMPANY, a Corporation; PRATT-GILBERT HARDWARE COMPANY, a Corporation; UNION OIL COMPANY OF ARIZONA, a Corporation; PHOENIX PLUMBING AND HEATING COMPANY, a Copartnership Composed of LEO FRANCIS, LYON FRANCIS and D. L. FRANCIS, Copartners; LEO FRANCIS, LYON FRANCIS and D. L. FRANCIS, as Individuals; WILLIAM L. HART, as Trustee in Bankruptcy of the Phoenix Plumbing and Heating Company, a Copartnership Composed of LEO FRANCIS, LYON FRANCIS and D. L. FRANCIS, copartners, Bankrupts, and CRANE COMPANY, a Corporation,

Appellees.

No. 6416

MOTION OF APPELLEES, TO DISMISS OR AFFIRM

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA.

COME now MOMSEN - DUNNEGAN - RYAN COMPANY, a corporation, PRATT-GILBERT HARDWARE COMPANY, a corporation, and UNION OIL COMPANY OF ARIZONA, a corporation, petitioning creditors, appellees herein, by Alice M. Birdsall, their counsel, and WILLIAM L. HART, as trustee in bankruptcy of the Phoenix Plumbing and Heating Company, a copartnership, composed of Leo Francis, Lyon Francis and D. L. Francis, copartners, bankrupts, appellee, by Thomas W. Nealon, his counsel, and move this court to dismiss, with costs, the appeal taken herein to this court, by the Standard Sanitary Manufacturing Company, a corporation, upon the following grounds:

I.

That this court is without jurisdiction to hear and determine the appeal herein attempted to be prosecuted by the Standard Sanitary Manufacturing Company, a corporation, appellant herein, for the reason that no appealable question within the purview of the Bankruptcy Act is presented by the proceedings herein, nor is said appeal prosecuted in accordance with the plain provisions of the Bankruptcy Act.

That this is so for the following reasons:

That the jurisdiction of this court to hear and determine this appeal is limited by the provisions of Section 25 of the Bankruptcy Act relating to appeals in "Proceedings in Bankruptcy", and the right of appeal to this court in the instant case, if any right exists, is governed by sub-section (1) thereof, providing for an appeal "From a judgment adjudging or refusing to adjudge the defendant a bankrupt." That as is apparent from the record herein, namely, from the Petition for Appeal

(Transcript pages 627-628) and from Assignments of Error of the appellant (Transcript pages 628-638), the appeal here attempted is expressly limited to two findings of fact and one conclusion of law made by the Master in his report and confirmed by the Judge of the District Court in rendering judgment confirming the Master's report in toto, being seventeen (17) findings of fact and five (5) conclusions of law based thereon, and adjudging the defendants bankrupts, said findings of fact and conclusions of law from which the appeal is sought, relating to an alleged preferential payment to the appellant (a creditor) herein, found by the Master to constitute an Act of Bankruptcy; and no appeal is sought or attempted with respect to the findings of fact of the Master, and the conclusions of law based thereon, finding other acts of Bankruptcy to have been committed, nor to the findings of fact of the Master and the conclusions of law based thereon, finding the Phoenix Plumbing and Heating Company to be a partnership, consisting of Leo Francis, Lyon Francis and D. L. Francis, nor from the judgment of the District Court for the District of Arizona adjudging defendants bankrupts, both as a partnership and individually.

That the appellant has, through counsel, entered into a stipulation with the counsel for the trustee in bankruptcy, appellee, as to the "Scope of the Appeal" herein, which stipulation is on file in this court and is in words and figures as follows:

"It is stipulated by and between the Standard Sanitary Manufacturing Company and the Trustee in Bankruptcy herein that the decision of the District Court in holding that acts of bankruptcy alleged in creditors petition other than the one based on finding of fact No. 16

were committed by the bankrupts, and the finding thereof was sustained by competent evidence free from all legal objections and that the appeal of the Standard Sanitary Manufacturing Company from said finding of fact No. 16 and conclusion of law No. 4 contained in the Master's Report, upon which the adjudication was based, is not intended to raise any question as to the adjudication in bankruptcy of bankrupts herein as of August 17, 1929, contained in the order of the District Court dated June 10, 1930, and of the appointment and jurisdiction of the Trustee over the entire bankrupt estate, save the right of the Trustee to take any action to bring back into the estate the Thirteen Thousand ($13,000.00) Dollars which is the subject matter of said finding of fact No. 16 and conclusion of law No. 4.

ARMSTRONG, KRAMER, MORRISON & ROCHE,
Attorneys for Standard Sanitary Manufacturing Company, Objecting Creditors and Appellant Herein.

THOMAS W. NEALON,
Attorney for William L. Hart, Trustee in Bankruptcy of the Phoenix Plumbing and Heating Company, a Copartnership Composed of Leo Francis, Lyon Francis and D. L. Francis, as Copartners and Individuals."

That appellant has, further, in its opening brief, filed herein, reiterated that no appeal is taken, or attempted, from the judgment adjudging the Phoenix Plumbing and

Heating Company, a copartnership, and Leo Francis, Lyon Francis and D. L. Francis, individually, bankrupts. This statement defining the extent of the appeal and the issues sought to be raised in this court which is an admission of counsel made in this court, binding upon the appellant, is found on pages 7 and 8 of Appellant's brief, and is as follows:

> "From this finding of fact and conclusion of law the Standard Sanitary Manufacturing Company excepted to the United States District Court, which exceptions were argued before the said court on the 10th day of June, 1930, and a decision rendered sustaining the Master's report in toto. From this judgment the Standard Sanitary Manufacturing Company, appellant herein, appealed to this court, *confining its appeal to the finding of fact and conclusion of law covering the so-called Lincoln Mortgage Company transaction, and the question of insolvency prior to the 20th day of July, 1929.*
>
> "In making this appeal the Standard Sanitary Manufacturing Company did not file a supersedeas bond, but filed a cost bond in the sum of $1500 and thereafter entered into a stipulation with the attorney for the Trustee in Bankruptcy by the terms of which it was provided that the scope of the appeal of the Standard Sanitary Manufacturing Company was and is confined to the Lincoln Mortgage Company transaction, and the question of insolvency insofar as the same affects said transaction.
>
> *"The Standard Sanitary Manufacturing Company did not at any time in the proceedings raise any question whatsoever as to the adjudication on the 17th day of August, 1929, nor to the findings of*

fact and conclusions of law on other acts of bankruptcy save the Lincoln Mortgage Company transaction." (Italics ours.)

That the jurisdiction of Federal courts with respect to bankruptcy matters is governed by the provisions of the Bankruptcy Act and that appellate procedure in Bankruptcy necessarily follows the plain provisions of said Act.

That appeals as of right in "bankruptcy proceedings" are strictly limited to the three matters clearly set forth in Section 25 of said Act as follows:

(1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over.

That appeals in bankruptcy in all other matters save the three judgments above specified can be taken only in accordance with the provisions of Section 24 of the Act, and said appeals must be allowed by the Appellate court, a procedure which has not been followed in this case.

That no authority can be found in Section 25 for such an appeal as is here attempted, and that since no appeal has been sought from the judgment herein adjudicating the defendants bankrupts, no appealable question is before this court for review, and the said appeal must be dismissed for lack of jurisdiction in this court.

II.

That appellant herein has not prosecuted an appeal from, nor asked for a review of, the whole of the judgment or decree rendered in said matter, and there is no

actual controversy involving real and substantial rights between the parties to the record and no subject matter upon which the judgment of the court can operate, so that the only matters of which review by this court are sought by appellant herein, are moot for the following reasons:

A judgment overruling objections to the report of the Special Master and confirming said report, and adjudging the Phoenix Plumbing and Heating Company, a copartnership, composed of Leo Francis, Lyon Francis and D. L. Francis, copartners, and D. L. Francis, Leo Francis and Lyon Francis, as individuals, to be bankrupt, was made and entered by F. C. Jacobs, Judge of the District Court for the District of Arizona, on the 10th day of June, 1930. (Transcript pages 34-35.) That appeal has not been taken from said judgment and decree, but only from one finding of fact and one conclusion of law based on said finding of fact of said Special Master, both of which concerned only one alleged act of Bankruptcy, relating to an asserted preferential payment of $13,000 to said appellant, and another finding of fact of said Special Master relating to the time of insolvency as affecting said alleged preferential payment made to said appellant, as will appear by the Assignments of Error of said appellant. (Transcript pages 628 to 638.)

That the only question sought to be reviewed by the appeal taken herein as appears by the record herein, (Transcript pages 627 to 638) and by the language of the stipulation as to the scope of appeal filed herein as follows:

> "It is stipulated by and between the Standard Sanitary Manufacturing Company and the Trustee in Bankruptcy herein that the decision of the Dis-

trict Court in holding that acts of bankruptcy alleged in creditors petition other than the one based on finding of fact No. 16 were committed by the bankrupts, and the finding thereof was sustained by competent evidence free from all legal objections and that the appeal of the Standard Sanitary Manufacturing Company from said finding of fact No. 16 and conclusion of law No. 4 contained in the Master's Report, upon which the adjudication was based, is not intended to raise any question as to the adjudication in bankruptcy of bankrupts herein as of August 17, 1929, contained in the order of the District Court dated June 10, 1930, and of the appointment and jurisdiction of the Trustee over the entire bankrupt estate, save the right of the Trustee to take any action to bring back into the estate the Thirteen Thousand ($13,000.00) Dollars which is the subject matter of said finding of fact No. 16 and conclusion of law No. 4.

ARMSTRONG, KRAMER, MORRISON & ROCHE,
Attorneys for Standard Sanitary Manufacturing Company, Objecting Creditors and Appellant Herein.

THOMAS W. NEALON,
Attorney for William L. Hart, Trustee in Bankruptcy of the Phoenix Plumbing and Heating Company, a Copartnership Composed of Leo Francis, Lyon Francis and D. L. Francis, as Copartners and Individuals."

and as further admitted by the language of said appellant in its opening brief filed herein, (appellant's brief pages 7 and 8) is stated in appellant's own language at the conclusion of its brief on page 45 thereof, as follows, to-wit: "that this appellant is entitled to a decision declaring said transaction to be not an act of bankruptcy, not an act made with intent to prefer one creditor over another."

That the appellant herein is seeking a "declaration" only upon this one matter without disturbing the adjudication of bankruptcy based upon other acts of bankruptcy, the findings on which are not set up as error, but on the contrary, are admitted by said stipulation to have been "sustained by competent evidence free from all legal objections."

That there is, therefore, no controversy involving real and substantial rights between the parties before this court, and no subject matter upon which the judgment of this court can operate for the reason that the right of the trustee to take action to bring back into the bankrupt estate said alleged preference of $13,000.00 could not be prejudged by this court, since the proof required for an alleged preference as constituting an act of Bankruptcy and that required for recovery of an alleged preference by the trustee is entirely different and covered by different provisions of the Bankruptcy Act. That the language governing the former is found in Section 3 of the Bankruptcy Act, as follows:

> "a—Acts of bankruptcy by a person shall consist of his having * * * (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors * * *. b—A petition may be filed against a person who is insolvent and who

has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after (1) the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer * * * for the purpose of giving a preference as hereinbefore provided * * *, if by law such recording or registering is required or permitted, or if it is not, from the date when the beneficiary take notorious, exclusive, or continuous possession of the property, unless the petitioning creditors have received actual notice of such transfer or assignment. * * * ."

While the provisions governing the latter are found in Section 60 of said Bankruptcy Act as follows:

"b—If a bankrupt shall have * * * made a transfer of any of his property, and if at the time of the transfer * * * or of the recording or registering of the transfer, if by law recording or registering thereof is required and being within four months before the filing of the petition in bankruptcy, or after the filing thereof and before the adjudication, the bankrupt be insolvent, and the * * * transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such * * * transfer would effect a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

That the petitioning creditors in the hearing upon the matter of adjudication were only required to make proof of said alleged Act of Bankruptcy in accordance

with the provisions of Section 3 of the Bankruptcy Act, and that even though this court, upon an examination of the record herein should find that the evidence adduced by the petitioning creditors at the hearing on adjudication was insufficient to warrant the Finding of Fact Number 16 and the Conclusion of Law Number 4 based thereon, with regard to said $13,000.00 payment made to the appellant constituting an act of Bankruptcy, since other acts of Bankruptcy were found by the court below and are unquestioned by this appeal, which would require an affirmance of the Order and Decree of Adjudication, no present controversy is presented by this appeal and the decision asked by appellant would necessarily be upon a moot question.

That the trustee in bankruptcy may never bring a suit against the appellant herein to recover the alleged preference, or may bring action against said appellant based on other evidence now or hereafter available to him, or may bring suit for recovery of said amount as a fraudulent transfer, but until some action is brought by said trustee for recovery of said amount, there is no present controversy, the subject matter of which presents a reviewable question to this court to be passed upon with respect to the $13,000.00 payment made to appellant herein, and the relief asked by appellant is clearly upon a moot question.

III.

That the appellant herein is estopped from asking review of a part of said judgment or decree entered by the District Court of the United States for the District of Arizona on the 10th day of June, 1930, namely, that part of said judgment which concerns an alleged preferential payment received by the appellant herein, and which rul-

ing concededly in no wise affects the adjudication in bankruptcy based upon other Acts of Bankruptcy, while taking advantage of the decree as a whole and accepting the benefits of the adjudication of bankruptcy.

That the appellant herein, both prior and subsequent to the taking of this appeal, has participated in the administration of the bankrupt estate, and its conduct in that respect is entirely inconsistent with the claim of right to review a part of said judgment or decree.

That said appellant on June 24, 1930, filed its unsecured claim in said Bankruptcy Court in the amount of $12,658.59, and participated in the election of a trustee in bankruptcy by voting its claim for the present trustee, and that thereafter and on the 8th day of November, 1930, at a meeting of creditors called for the purpose of authorizing the trustee to oppose the discharge of D. L. Francis, one of the bankrupts, it voted its claim in favor of so authorizing said trustee to oppose said bankrupt's discharge, and that on April 2nd, 1931, it filed, in conjunction with the McGinty Construction Company, a petition to the Bankruptcy Court asking an order authorizing the trustee in Bankruptcy to disclaim on a defaulted contract; all of which appears by certified copies of said proceedings of said Bankruptcy Court hereto attached, marked Exhibit "A" and by reference made a part hereof.

WHEREFORE, Appellees, Momsen-Dunnegan-Ryan Company, a corporation, Pratt-Gilbert Hardware Company, a corporation, and Union Oil Company of Arizona, a corporation, and William L. Hart, as trustee in bankruptcy of the Phoenix Plumbing and Heating Company, a copartnership composed of Leo Francis, D. L. Francis, and Lyon Francis, copartners, and Leo Francis, D. L.

Francis and Lyon Francis, as individuals, bankrupts, ask this Honorable Court to dismiss the appeal filed by the Standard Sanitary Manufacturing Company, appellant herein, at its costs.

ALICE M. BIRDSALL,
Counsel for Momsen-Dunnegan-Ryan Company, a Corporation, Pratt-Gilbert Hardware Company, a Corporation, and Union Oil Company of Arizona, a Corporation, Petitioning Creditors, Appellees.

THOMAS W. NEALON,
Counsel for William L. Hart as Trustee in Bankruptcy of the Estate of the Phoenix Plumbing and Heating Company, Bankrupt, a Copartnership, Consisting of Leo Francis, D. L. Francis and Lyon Francis, Copartners, and D. L. Francis, Leo Francis and Lyon Francis, as Individuals, Bankrupts, Appellee.

MOTION TO AFFIRM

And in the alternative, the said Appellees, Momsen-Dunnegan-Ryan Company, a corporation, Pratt-Gilbert Hardware Company, a corporation, and Union Oil Company of Arizona, a corporation, and William L. Hart, as trustee in bankruptcy of the Phoenix Plumbing and Heating Company, a copartnership composed of Leo

Francis, D. L. Francis and Lyon Francis, copartners, and D. L. Francis, Leo Francis and Lyon Francis, as individuals, bankrupts, also move this Court to affirm the said Judgment and Decree entered by the District Court of the United States for the District of Arizona, on the 10th day of June, 1930, from a part of which Judgment and Decree, the appeal in the above entitled cause purports to have been taken, with costs to said Appellees, on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

ALICE M. BIRDSALL,
Counsel for Momsen-Dunnegan-Ryan Company, a Corporation, Pratt-Gilbert Hardware Company, a Corporation, and Union Oil Company of Arizona, a Corporation, Petitioning Creditors, Appellees.

THOMAS W. NEALON,
Counsel for William L. Hart as Trustee in Bankruptcy of the Estate of the Phoenix Plumbing and Heating Company, Bankrupt, a Copartnership, Consisting of Leo Francis, D. L. Francis and Lyon Francis, Copartners, and D. L. Francis, Leo Francis and Lyon Francis, as Individuals, Bankrupts, Appellee.

UNITED STATES OF AMERICA,
DISTRICT AND STATE OF ARIZONA,
COUNTY OF MARICOPA. } SS.

ALICE M. BIRDSALL and THOMAS W. NEALON, being each duly sworn, each for herself and himself, and not one for the other, doth depose and say: I have read the within Motion to Dismiss, and in the alternative, Motion to Affirm, in the above entitled matter and know the contents thereof; and that the statements contained therein are true, according to the best of my knowledge, information and belief.

Alice M. Birdsall,

Thomas W. Nealon,

Subscribed and sworn to before me this 16th day of May, 1931.

(Seal)

Sara L. O'Brien,
Notary Public In and For Maricopa County, Arizona.

My commission expires: January 6, 1934.

STATEMENT OF FACTS RELATING TO MOTION TO DISMISS AND MOTION TO AFFIRM.

On August 17, 1929, Momsen-Dunnegan-Ryan Company, a corporation, Pratt-Gilbert Hardware Company, a corporation, and Union Oil Company of Arizona, a corporation, filed an involuntary petition in bankruptcy against the Phoenix Plumbing and Heating Company, a copartnership, composed of Leo Francis, Lyon Francis and D. L. Francis, copartners, and Leo Francis, Lyon Francis and D. L. Francis, as individuals, setting up the necessary jurisdictional facts, and alleging several acts of bankruptcy. (Transcript, pages 2-10).

Thereafter the Phoenix Plumbing and Heating Company and Leo Francis for himself, filed an admission of willingness to be adjudged a bankrupt, together with Schedules showing an excess of liabilities over assets of $27,061.26, (Transcript, pages 134-135) and D. L. Francis and Lyon Francis filed answers admitting insolvency of the Phoenix Plumbing and Heating Company, but denying that said Phoenix Plumbing and Heating Company was a partnership and denying that they were partners therein.

The Standard Sanitary Manufacturing Company, a corporation, and Crane Company, a corporation, creditors of said alleged bankrupts, filed answers admitting that said Phoenix Plumbing and Heating Company was a copartnership, composed of Leo Francis, Lyon Francis and D. L. Francis, but denying the allegations of insolvency and of the various acts of bankruptcy in said creditors' petition theretofore filed. (Transcript, pages 10-17 for answer of Standard Sanitary Manufacturing Company, and stipulations and admissions, Transcript pages 240-245.)

The issues made by said petition in bankruptcy and said respective answers were on November 4th, 1929, referred to R. W. Smith as Special Master to ascertain and report the facts with his conclusions thereon. (Transcript, pages 17 and 18.)

That thereafter commencing on November 20th, 1929, and continuing for a considerable period thereafter, hearings were had before said R. W. Smith, sitting as a Special Master, under said order of reference, and evidence, both oral and documentary, was presented by said petitioning creditors in support of said petition in bankruptcy, and documentary evidence was submitted by contestants.

On the *11th* day of December, 1929, Crane Company, after first receiving permission so to do, withdrew its answer theretofore filed opposing said adjudication of bankruptcy, (Transcript, page 580) and withdrew from further part in said proceedings.

The matter was at the conclusion of the hearings submitted, and thereafter on February 18th, 1930, said Special Master made and filed his report (Transcript, pages 18-27), said report covering some seventeen findings of fact and five conclusions of law, and recommending that said Phoenix Plumbing and Heating Company, a copartnership composed of Leo Francis, Lyon Francis and D. L. Francis, copartners, and Leo Francis, Lyon Francis and D. L. Francis, as individuals, and each of them be adjudged bankrupt as of the date of the filing of said involuntary petition, to-wit, August 17th, 1929.

That thereafter exceptions to said report of said Special Master were filed by said Standard Sanitary Manufacturing Company, the appellant herein, and by

D. L. Francis, and Lyon Francis, alleged bankrupts, which exceptions were argued by counsel and submitted to F. C. Jacobs, Judge of the District Court for the District of Arizona, on the 21st day of May, 1930, (Transcript, page 34), and on the 10th day of June, 1930, a decree was entered by said F. C. Jacobs, District Judge as aforesaid, overruling the objections to the report of said Special Master and approving and confirming said report of said Special Master, and declaring and adjudging the said Phoenix Plumbing and Heating Company, a copartnership, composed of Leo Francis, D. L. Francis and Lyon Francis, copartners, and Leo Francis, Lyon Francis and D. L. Francis, as individuals, to be bankrupts. (Transcript, pages 34 and 35.)

That thereafter the appellant, the Standard Sanitary Manufacturing Company, petitioned for appeal, which appeal was allowed by F. C. Jacobs, Judge of the District Court of the United States for the District of Arizona, on the 25th day of June, 1930, (Transcript, pages 627-628); that said Standard Sanitary Manufacturing Company, appellant, on said date, to-wit, June 25, 1930, filed in said court, its Assignments of Error, the same being directed to the Master's findings of fact Numbers 5 and 16, and conclusion of law Number 4, (Transcript, pages 629, 635 and 636) and praying that the Judgment of the District Court of the United States for the District of Arizona, overruling the objections of the Standard Sanitary Manufacturing Company, a corporation, to the Master's report, "*in so much thereof* as declares the payment of the $13,000.00 received from Lincoln Mortgage Company to the Standard Sanitary Manufacturing Company, a corporation, by the said Phoenix Plumbing and Heating Company, a *corporation,* be reversed" etc. (Transcript, page 638.)

That on June 25th, 1930, Citation on Appeal was duly issued out of the District Court of the United States for the District of Arizona, directed to the appellees herein, citing said appellees to show cause in this court why the Judgment of said court "overruling the Standard Sanitary Manufacturing Company's objections to the Special Master's report and the Order of Adjudication in bankruptcy of the Phoenix Plumbing and Heating Company, *in so far as the same is affected by the said objections,* should not be corrected." (Italics ours) (Transcript, pages 653-654.) No supersedeas bond was filed staying said Judgment and Adjudication, but only a cost bond. (Transcript pages 638-640.)

On June 24, 1930, the first meeting of creditors of said bankrupt estate was held, at which meeting the appellant herein, Standard Sanitary Manufacturing Company, a corporation, appeared, and by its attorneys in fact thereunto duly authorized, filed its claim in the amount of $12,658.59, and participated in the proceedings by voting its claim for William L. Hart, as trustee in bankruptcy; said William L. Hart being thereupon elected by the majority in number and amount of the claims present and voting, and thereafter qualifying as such trustee, and being at the present time, the acting trustee of said bankrupt estate; that thereafter and on November 8, 1930, at a meeting of creditors called for the purpose of authorizing the trustee, to oppose the discharge of D. L. Francis, said appellant, Standard Sanitary Manufacturing Company, by and through its duly authorized attorney in fact voted its claim in favor of authorizing said trustee in bankruptcy to oppose said discharge of D. L. Francis, and on April 2, 1931, it further participated in proceedings in said Bankruptcy Court by joining with

the McGinty Construction Company in a petition asking the court for an order authorizing the trustee to disclaim on the defaulted contract of the Phoenix Plumbing and Heating Company; all of which appears by certified copies of proceedings in said bankruptcy court hereto attached marked Exhibit "A" and by reference made a part hereof.

The record on appeal was filed in this court on March 23, 1931.

BRIEF OF THE ARGUMENT

I.

No Appellate Jurisdiction or Appealable Decision.

Appellate jurisdiction does not exist as to the matter herein sought to be reviewed.

This is not an appeal from any of the three classes of "proceedings" enumerated in Section 25 of the Bankruptcy Act, as to which right of appeal is given. Neither can it be said to be an appeal prosecuted from orders in the "bankruptcy proceedings" other than the three enumerated in said Section 25, nor "in controversies arising in bankruptcy proceedings," both of which are allowable only by the Circuit Court of Appeals,—the appeal herein having been allowed by the court below and no application for appeal having been made to this court.

> "An important distinction is that appeals from orders in 'proceedings in bankruptcy' are allowable by the court below as in equity, if they are of three kinds of orders or judgments described in Bankruptcy Act § 25 (a); whereas appeals from orders in 'bankruptcy proceedings' of any other kinds than

those three, and in 'controversies arising in bankruptcy proceedings' are allowable only by the Circuit Court of Appeals and will reach only errors of law." Vol. 5. Fed. Proc. Sec. 2564, pp. 860-861.

Appeal petitions contained in the records and presented to and allowed by the District Court are not to be taken as applications to the Circuit Court of Appeals for leave to appeal under Section 24b of the Bankruptcy Act.

Ahlstrom v. Ferguson, 29 Fed. (2) 515, 13 A. B. R. (N. S.) 216.

Appeal from an order denying petition to amend specifications of objection to discharge held not appealable without allowance by the Circuit Court of Appeals and appeal dismissed.

American State Bank v. Ullrich, 28 Fed. (2) 753.

An order vacating an adjudication is not a judgment from which an appeal will lie under Section 25, nor is an order sustaining a demurrer to a petition filed for the purpose of vacating an adjudication.

Gilbert's "Collier on Bankruptcy" (1927) p. 558.

An order refusing to vacate and set aside an adjudication in bankruptcy is not appealable under Section 25a of the Bankruptcy Act.

B. R. Elec. & Tel. Mfg. Co. v. Aetna Life Ins. Co., 30 A. B. R. 424, 206 Fed. 885.

In re Ives, 7 A. B. R. 692, 113 Fed. 911.

Matter of DeCamp Glass Casket Co. et al., 47 A. B. R. 1, 272 Fed. 558.

An appeal from an order sustaining a demurrer to specifications of objection to application for discharge of

bankrupt was not an order "granting or denying a discharge," and it was therefore reviewable by an appeal under Section 24b and not under Section 25 of the Bankruptcy Act.

Broders v. Lage, 25 Fed. (2) 288.

Obviously, this is not an appeal from a "judgment adjudging or refusing to adjudge the defendant a bankrupt", which is allowed as of right under Section 25 of the Bankruptcy Act, because no error is assigned on the matter of adjudication, and the stipulation of counsel for the appellant herein admits that said adjudication upon other acts of bankruptcy than the one concerning which appeal is sought, was based on "competent evidence free from legal objection." (See stipulation as to scope of appeal.)

The brief of appellant also expressly states that no appeal is sought from the adjudication. (See appellant's brief, pages 7 and 8.)

The record shows conclusively that the adjudication in bankruptcy was based on three different acts of bankruptcy found by the Master to have been committed by the bankrupts. (Transcript, pages 24 and 25.)

As to two of these acts of bankruptcy, relating to preferential transfers to Crane Company, (Transcript, pages 24 and 25) no errors are assigned.

Any one act of bankruptcy set up in creditors' petition was sufficient to sustain an adjudication of bankruptcy.

"An adjudication of bankruptcy warranted by proof of an act of bankruptcy sufficiently alleged may not be

set aside because other alleged acts of bankruptcy were not properly pleaded and proved."

In re Lynan, et al., 127 Fed. 123, 62 C. C. A. 123; 11 A. B. R. 466.

II.

Appeal Sought is Wholly Upon Matters Which Are Moot.

The appeal attempted to be prosecuted in this case is not from a judgment of adjudication, but only from that part of the judgment rendered by the District Court of the United States for the District of Arizona, (which judgment confirmed the report of the Special Master finding three different specific acts of bankruptcy to have been committed, and finding the Phoenix Plumbing and Heating Company to be a partnership, as well as adjudicating said partnership and the individual members thereof bankrupts) which related to two findings of fact and one conclusion of law, all bearing on only one of the acts of bankruptcy found by the Master to have been committed by the bankrupts, concerning an alleged preferential payment to the appellant herein.

The language of appellant's brief on page 45 thereof, stating the relief sought by appellant in this court, limits and defines said question as follows: "That this appellant is entitled to a decision declaring said transaction to be not an act of bankruptcy, not an act made with intent to prefer one creditor over another"; and that the decision so asked by appellant, of necessity could be only moot.

It is the duty of a federal appellate court to decide actual controversies and not to declare principles of law which cannot affect the matter in issue in the case before it.

6 *Fed. Proc.* § 2966, p. 563.

In this case the court is asked to declare a principle of law, as well as examine and pass on the sufficiency of evidence, when there is no actual controversy before it, and one may never arise; the correctness of the finding of the Master upon the *one* Act of Bankruptcy based on an alleged preferential transfer to the appellant herein not affecting the adjudication of bankruptcy upon other acts found to have been committed, and a determination by this court of the matter here sought to be reviewed, being futile, since a decision could in no way bind the trustee or creditor in any actions which may be brought in the future to set aside the transfer, either as preferential or fraudulent.

A finding on a creditors' petition that a charge of preferential transfer of property by the alleged bankrupts was not sustained is not an adjudication which could bind a trustee subsequently appointed on an adjudication made by another court in a suit brought by him against the alleged preferred creditor to recover the property.

In re Sears-Humbert & Co. 128 Fed. 275, 62 C. C. A. 623.

The alleged bankrupt may not appeal from a judgment dismissing an involuntary petition on the ground that the trial court based its decree on other reasons than those urged by him, or not on all reasons urged.

Houchin Sales Co. v. Angert, 11 Fed. (2) 115.

Suggested questions which have not yet arisen not discussed.

Murphy v. Kerr, 5 Fed. (2) 908.

An appeal from a decree dismissing an involuntary petition is moot where it is disclosed that upon the rendition of the decree, the alleged bankrupt was adjudicated a bankrupt upon another petition.

Hirsh & Bro. v. Cohen & Brown, 22 Fed. (2) 806, 11 A. B. R. (N. S.) 222.

Appellate courts will not anticipate possible grievances or try cases piece-meal.

Pearson v. Higgins, 34 Fed. (2) 27. Cert. denied, 280 U. S. 593, 50 Sup. Ct. 39, 74 L. Ed. 641.

Where there is now no actual controversy between the parties and no subject matter upon which the judgment of the court can operate, the appeal will be dismissed.

Mills v. Green, 159 U. S. 651, 40 L. Ed. 293, 16 Sup. Ct. Rep. 132.

Kimball v. Kimball, 174 U. S. 158, 43 L. Ed. 932.

Lewis Pub. Co. v. Wyman, 228 U. S. 610, 57 L. Ed. 989, 33 Sup. Ct. Rep. 559.

III.

Appellant Estopped to Prosecute Appeal from Part of Judgment While Accepting Benefits of Other Part of Judgment.

The appellant herein is seeking review of part of a judgment of the District Court of the United States for the District of Arizona, namely, findings of the Master confirmed by the District Court concerning an Act of Bankruptcy consisting of a preferential transfer by bankrupt to appellant, while accepting the benefits of the adjudication in bankruptcy by filing its claim in the

bankruptcy court and participating in the proceedings and the conduct of the administration of the bankrupt estate.

The rule is well settled that parties to a decree cannot accept its benefits and at the same time have a review in respect to its burdens.

Albright v. Oyster, 60 Fed. 644, 9 C. C. A. 173.

Spencer v. Babylon R. Co., 250 Fed. 24, 34 C. C. A. 668.

One cannot accept a benefit under a judgment and then appeal from it when the effect of the appeal may be to amend the judgment unless his right to benefit is absolute and cannot be affected by a reversal.

In re Minot Auto Co., 298 Fed. 853.

A creditor by filing its claim in bankruptcy acquiesces in the adjudication and having participated in subsequent proceedings cannot thereafter object to adjudication.

In re Hintze (D. C.) 134 Fed. 141.

In re Worsham, 142 Fed. 121, 73 C. C. A. 665.

In re New York Tunnel Co., 166 Fed. 284, 92 C. C. A. 202.

Sabin v. Larkin-Green-Logging Co., 218 Fed. 984, 986.

ARGUMENT

Paragraph I.

No Appellate Jurisdiction.

It is the belief of appellees that the Motion to Dismiss should be granted for the reason that this court is

without jurisdiction to hear the appeal attempted to be prosecuted, because no appeal lies to this court as a matter of right under the provisions of Section 25 of the Bankruptcy Act, providing three judgments only appealable as of right, and in which the appeal is allowed by the lower court.

The appeal is not sought in this case from "a judgment adjudging or refusing to adjudge the defendant a bankrupt" as appears from the Citation on Appeal, the Assignments of Error, the Stipulation as to the Scope of Appeal, and the Brief of the appellant hereinbefore pointed out, all expressly stating that *no appeal is taken from the order of adjudication.*

The only possible way in which a review of the questions here sought to be brought before this court could be obtained, would have been through a petition to this court for allowance of an appeal under the provisions of Section 24b of the Bankruptcy Act, it being within the discretion of this court to allow such appeals.

The case of Broders v. Lage, 25 Fed. (2) 288, decided by the Circuit Court of Appeals for the Eighth Circuit, in March, 1928, reviews at length, the appellate jurisdiction granted under the Bankruptcy Act and the evident intention of Congress in limiting appeals in Bankruptcy. In that case it was held that an order sustaining a demurrer to Specifications of Objection filed by the trustee and a creditor, to the application of the bankrupt for order of discharge, was not an order "granting or denying a discharge," and it was, therefore, reviewable by an appeal under Section 24b, and not under Section 25 of the Bankruptcy Act.

The court said: "The clause 'to be allowed in the discretion of the appellate court' applies to appeals under Section 24b and not to appeals under Section 25." Then, after calling attention to the fact that the order sustaining the demurrer was entered April 12, 1927, and the petition for appeal filed May 10, 1927, which appeal was allowed by the trial judge on May 12, 1927, and the transcript not filed in the office of the clerk of the appellate court until July 8, 1927, the court continues, "and no application for the allowance of an appeal from the order complained of has ever been made to this court and no such appeal has been allowed by this court.

> "It will be observed that Section 24b provides for review by appeal of all orders both interlocutory and final, entered in proceedings in bankruptcy. The absolute right to prosecute such an appeal would open the door to innumerable appeals from summary orders entered in bankruptcy proceedings, which might greatly impede the due and proper administration of the estates of bankrupts. We think Congress sensed this danger and for that reason, wrote into the Act the language 'by appeal * * * to be allowed in the discretion of the appellate court' and thereby intended to provide that a party desiring to prosecute an appeal from such an order, must make proper application to the appellate court for an order allowing such appeal, and that the appellate court, upon the consideration of such application, in the exercise of its discretion, may either grant or deny the application.
>
> "The authors of Collier on Bankruptcy in the note to Section 24 as amended at page 159 of the 1927 supplement, say: 'The scope of this amendment as explained by Senator Walsh, who suggested it, is stat-

ed by him as follows: "It would be intolerable, however, to allow an appeal from every order which might be made in bankruptcy proceedings and, consequently, the bill was modified so as to provide that except in the cases mentioned in Section 25, the appellate court should exercise a discretion as to whether an appeal should be allowed or not. Accordingly, the plain meaning of the law as amended is that in the cases mentioned in Section 25, the right to appeal is absolute, and no leave need be taken. In all other cases as prescribed in subdivision "b" of Section 9, (24b of the Bankruptcy Act) the party desiring to have an order reviewed must go to the appellate court and ask leave to prosecute an appeal." ' ". * * * * * "no application for the allowance of an appeal having been made to this court within the statutory period, this court is without jurisdiction to enter into a consideration of the merits and must dismiss the appeal."

It must be remembered that appeals in bankruptcy are purely statutory and the jurisdiction of the appellate court with relation thereto is limited by the language of the Act itself. The definiteness of the language of Section 25 specifying the judgments from which appeals can be taken as a matter of right, and the consistency with which appellate courts have held their jurisdiction to be limited in appeals allowed by the court below and prosecuted as a matter of right to only such judgments as are distinctly classified therein, precludes the conclusion that it was intended appeal might be taken under Section 25 from subsidiary parts of a judgment, not relating to the main issue, the appeal not seeking a reversal of that main issue. In other words, it is evident that the three clear-cut issues entitled to be reviewed without permission of

the appellate court are set forth so distinctly for the very purpose of avoiding confusion, and also, as suggested in the language quoted in Broders v. Lage, for the purpose of preventing the appellate court from being flooded with a mass of unnecessary work in examining lengthy records on matters of fact as well as of law, in questions involving the administration of estates, many of which appeals would doubtless be taken for the very purpose of delaying and hindering due administration.

The first of the matters classified from which appeal can be taken as a matter of right, is a judgment in rem—the judgment either denying or granting an adjudication, and the issue involved is primarily the status of the alleged bankrupt. The second is likewise a judgment fixing the status of the bankrupt, namely, a judgment granting or denying him a discharge, and the third is a judgment, fixing the status of a creditor in the bankrupt estate, namely, allowing or rejecting a claim for over $500.00. While it is, of course, conceded, that on an appeal from any one of these judgments, properly taken, all questions of law and fact pertaining thereto may be reviewed, yet it does not follow that an appeal may be prosecuted under this provision from some incidental question not necessary to support the main issue without appealing from the judgment on such main issue, concerning which the right of appeal is given, and where indeed it is expressly provided that the appeal taken shall *not* disturb the status fixed by the decision on that main issue.

The case at bar involved a contest on an adjudication in bankruptcy, on an involuntary petition in bankruptcy alleging several Acts of Bankruptcy, and after extended hearings, the Master made a report finding

three separate acts of bankruptcy to have been committed by the bankrupts and recommending adjudication (this in addition to finding a partnership to have existed as alleged). The District Judge entered an order confirming the Master's report in toto, and adjudged the defendants bankrupts. From this adjudication no appeal is sought, but the appellant by express language in its petition for appeal, by putting up no supersedeas bond staying the administration of the estate in bankruptcy, by the stipulation filed herein as to the scope of the appeal, and by the language of its brief filed herein has unqualifiedly stated that no appeal is taken or *desired* from the Order of Adjudication.

Appellees submit that under the authorities hereinbefore cited on this point and under the plain provisions of the Bankruptcy Act, the appeal in this case is not prosecuted from any of the judgments defined in Section 25 of the Bankruptcy Act, appealable as a matter of right, and no appeal having been allowed by this court under the provisions of Section 24b of the Act, this court is without jurisdiction and the appeal should be dismissed.

PARAGRAPH II.

Appeal Sought on Matters Which are Moot.

It is admitted by appellant as appears from the language of its brief (pages 7, 8 and 45) and by the stipulation filed on the "Scope of the Appeal," that it is not now questioning, and never has questioned, the adjudication of bankruptcy as of August 17, 1929, the date of the filing of creditors' petition.

It does not question other findings of fact and conclusions of law on other acts of bankruptcy and the relief

asked for in this court is for a decision "declaring said transaction to be not an Act of Bankruptcy, not an Act made with intent to prefer one creditor over another"; (referring to a transaction which it designates as the "Lincoln Mortgage Company transaction" and which it claims was not a preferential payment to appellant constituting an Act of Bankruptcy).

It appears so elementary that a decision of this court granting all the relief asked by appellant, could be only moot, that discussion seems unnecessary.

As was said in the case of in Re Sears-Humbert & Co., 128 Fed. 275, 62 C. C. A. 623, (that being a case where a petitioning creditor appealed from a judgment dismissing its petition and refusing to adjudge Sears-Humbert & Co. bankrupts on the ground that a transfer alleged to have been preferential had not been sustained as an act of bankruptcy, the same company having been meanwhile adjudicated bankrupt in another District:)

> "The question presented by this appeal has, therefore become academic. The copartnership being now in bankruptcy, it is a matter of no moment whatever whether the specific act of bankruptcy alleged in the petition in the Western district, was or was not established. A reversal of the judgment appealed from would lead to no practical result. * * * It is suggested that the judgment appealed from will be a bar to an action by the trustee to set aside the alleged preference to the Whitehall Portland Cement Company, which was pleaded as an Act of Bankruptcy. This proposition is also untenable. The trustee, if he proceeds in the matter, must begin a plenary suit in which he is the plaintiff and the Cement Company is defendant. How a judgment in a proceeding insti-

> tuted by certain creditors to have Sears-Humbert & Co. declared bankrupts can be regarded as res adjudicata of such a suit, we are unable to comprehend. The parties are different, the proof is different and the subject matter is different."

That decision is squarely in point in the instant case, where exactly the same situation prevails, the only difference being that in the case cited, review was sought by petitioning creditors and the adjudication had been made in another district; but the main issue remains the same, namely, that no decision by an appellate court as to whether a certain transfer was a preferential payment which constituted an act of bankruptcy, where adjudication had been made on other grounds, could bind a trustee in future proceedings for recovery of the preference.

The matters sought to be reviewed here are, therefore, necessarily moot. There is no right of the appellant which is being prejudiced, no present controversy existing, the subject matter of which can be passed upon by this court. As has been heretofore pointed out and as is well said in the Sears case, the proof required to sustain a transfer as preferential so that it will constitute an act of bankruptcy, and that required to make recovery by the trustee in a plenary suit brought for that purpose, is entirely different.

The Supreme Court of the United States has, in many cases, laid down the rule concerning the duty of appellate courts when moot questions are presented for review, in such clear and unmistakable terms that no doubt can exist on the subject.

As was said in California v. San Pablo & Tulare R. R. Co., 149 U. S. 308, 37 L. Ed. 747:

> "The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the results as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power or affect the duty of the court in this regard."

And that language has been approved by the same court in the case of Mills v. Green, 159 U. S. 651, 40 L. Ed. 293, and in Kimball v. Kimball, 174 U. S. 158, 43 L. Ed. 932.

See also Lewis Publishing Company v. Wyman, 228 U. S. 610, 57 L. Ed. 989.

Appellees, therefore, submit that the matters on which review is sought by this court in appellant's attempted appeal are so clearly moot that the appeal must be dismissed.

PARAGRAPH III.

Estoppel of Appellant.

The appellant herein is admittedly seeking a review by this court of a part of a judgment and by way of relief is asking a "declaration" that certain findings concerning transactions in which appellant was involved are

incorrect, while accepting the benefits of a judgment of adjudication by filing its claim in the Bankruptcy Court and actively participating in proceedings in that court in the administration of the bankrupt estate.

It is more than willing as appears by the record, to accept any benefits which may accrue from such administration of the estate, but unwilling to submit to any burdens which may be imposed by the judgment of adjudication. In other words, it is asking a court of equity to grant relief (in advance) from such burdens as the Bankruptcy Court may impose upon creditors, while it takes advantage of the machinery of that court to further its own interests.

That by the filing of a claim in the Bankruptcy Court a creditor acquiesces in the adjudication seems to be well settled by an unbroken line of decisions.

As was said in the case of Sabin v. Larkin-Green Logging Co., 218 Fed. 984:

> "There exists another reason, however, why the defendant should not be permitted to resist the suit, which is that it has subsequently proved its claim as unsecured, and participated in the subsequent proceeding. Having done this and it is so alleged, it cannot object to the jurisdiction of the court to make the adjudication,"

citing in support thereof:

In re Hintze, 134 Fed. 141.

In re Worsham, 142 Fed. 121, 73 C. C. A. 665.

In re New York Tunnel Co., 166 Fed. 284, 92 C. C. A. 202.

all to the same effect.

That parties to a decree cannot accept its benefits and at the same time have a review in respect to its burdens seems equally well settled.

Spencer v. Babylon R. Co., 250 Fed. 24.
Albright v. Oyster, 60 Fed. 644, 9 C. C. A. 173.
In re Minot Auto Co., 298 Fed. 863.

That the appellant herein has filed its claim in the Bankruptcy Court and actively participated in the proceedings in that court in the administration of the estate is proven by the records of said court, herewith submitted.

That on a Motion to Dismiss, such matters may be proved by extrinsic evidence has been held by the Supreme Court of the United States in the following cases:

Mills v. Green, 115 U. S. 651, 40 L. Ed. 293.
Dakota County v. Glidden, 113 U. S. 222, 28 L. Ed. 981.

In the latter case it was said:

> "From the necessity of the case, this court is compelled, as all other courts are, to allow facts which affect its right and its duty to proceed in the exercise of its appellate jurisdiction, but which do not appear on the record before it, to be proved by extrinsic evidence."

Appellees respectfully submit that appellant's position in attempting to appeal from a certain part of a judgment, while it accepts the benefits of the other part of the judgment of adjudication by filing its claim in the Bankruptcy Court and participating in the proceedings therein, cannot be sustained, and that its appeal must be dismissed, by reason of its estoppel to prosecute the same.

Since the above authorities and discussion cover all matters contained in the alternative "Motion to Affirm," in the interest of brevity, no separate argument is submitted in connection therewith.

Respectfully submitted,

ALICE M. BIRDSALL,
Counsel for Momsen-Dunnegan-Ryan Company, a Corporation, Pratt-Gilbert Hardware Company, a Corporation, and Union Oil Company of Arizona, a Corporation, Petitioning Creditors, Appellees.

THOMAS W. NEALON,
Counsel for William L. Hart, as Trustee in Bankruptcy of the Estate of the Phoenix Plumbing and Heating Company, Bankrupt, a Copartnership, consisting of Leo Francis, D. L. Francis and Lyon Francis, copartners, and D. L. Francis, Leo Francis and Lyon Francis, as Individuals, Bankrupts, Appellee.

EXHIBIT "A"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ARIZONA

In the Matter of Phoenix Plumbing & Heating Co.
a copartnership
Bankrupt

No. B 522 Involuntary

REFEREE'S RECORD OF PROCEEDINGS

Involuntary petition filed Sept. 18, 1929; Adjudicated June 10, 1930.

1930

June 11, 1. Order of Adjudication and reference.

2. Schedules of Partnership—2 copies received from Clerk.

June 12, 3. Order fixing date for first meeting of creditors.

June 13, 4. Notice to Leo Francis to appear (copy to O. E. Schupp, Atty.)

June 13, 5. Notice to Lyon Francis to appear (copy mailed O. E. Phlegar, Atty.)

June 13, 6. Notice to D. L. Francis to appear.

June 23, 7. Proof of Publication of Notice of first meeting.

June 24, 8. Affidavit of Mailing notices.

June 24, First meeting of creditors held (see minutes filed.)

June 24, 9. Filed Minutes of first meeting.

June 24, 10. Order continuing first meeting to 6-25-30.

June 24, 11. Election of Trustee by Creditors.

June 24, 12. Notice to Trustee of appointment.

June 24, 13. Trustee's acceptance.

June 24, Bond of William L. Hart, Trustee. Transmitted to Clerk for filing (Bond written by F & D Co. of Maryland, Amt. $1000.00)

June 24, 1930 14. Order approving bond of Trustee.

June 25, 15. Filed Notice of taxing costs in involuntary proceedings.

June 25, 16. Filed Oath of Trustee.

June 25, 17. Filed Petition by Trustee to employ counsel.

June 25, 18. Affidavit of Attorney proposed.

June 25, 19. Order authorizing trustee to employ counsel.

June 25, Held—Continued 1st meeting of creditors (see minutes).

June 25, 20. Filed Minutes of Continued first meeting.

June 25, 21. Filed Petition for sale of personal property.

June 25, 22. Filed Order for Sale of Personal property.

June 25, 23. Filed Order adjourning meeting to July 24, 1930.

July 9, 24. Filed Schedules of D. L. Francis—2 copies.

July 1, 24½. Report and account of Receiver.

July 24, Held—Continued meeting held Present: The trustee and his counsel, T. W. Nealon Upon motion of Trustee the meeting to adjourn to August 2nd, 1930. Receiver's report approved and Receiver Discharged.

July 24, 24¾. Order approving acct. and Report of Receiver and for Receiver's Discharge.

July 29, 25. Filed—Schedules for Lyon Francis—2 copies.

Aug. 2, Held—Continued meeting of creditors. Present, the Trustee and his attorney, T. W. Nealon, esq.,
Verbal report of matters connected with the estate made by attorney for trustee with request for continuance to August 20, 1930. Ordered that the meeting stand adjourned until August 20th, 1930.

Aug. 20, Continued meeting held. Trustee verbally reported his inability to make sale of the property of the estate and asked for instructions as to procedure with reference to storage of property and fire insurance which expires today.
Upon motion of counsel for trustee ordered that this meeting be and hereby is adjourned to Sept. 2nd, 1930.

Sept. 2, 26. Return of Sale of personal property. Continued meeting held. Present: The Trustee and his Attorney, Thos. W. Nealon.
Trustee's return of sale of personal property considered and no adverse interests appearing the said sale is approved and con-

firmed, and the Trustee authorized to make proper conveyance by bill of sale upon receipt of the full purchase price as in said returns set forth.
Upon motion of Trustee the first meeting of creditors herein is finally adjourned.

Sept. 2, 27. Order approving and confirming sale.

Sept. 2, 28. First account & report of Trustee and petition for payment of expenses and for dividend.

Sept. 22, 29. Ordered that meeting of creditors be held on October 4th, 1930 at 10 A. M.

Sept. 22, Notice of meeting mailed to all creditors of partnership and individual estates.

Oct. 4, Meeting of creditors held. Appearances: The Trustee in person and by counsel, Thomas W. Nealon, Esq. The bankrupt Leo Francis by counsel, O. E. Schupp; the petitioning and other creditors by Alice M. Birdsall, Atty. Standard Sanitary Mfg. Co. by F. J. Duffy, Esq., Atty. and J. H. Williams, Creditor; Trustee's first account and report examined and being found correct the same is approved. Certain expenses incurred by the Trustee and those of petitioning creditors as fixed by the Judge of the U. S. District Court are fixed, allowed and ordered paid in full. Allowance on account made to Referee for expenses in the sum of $125.00.

Allowance to attorney for petitioning creditors on account is made in the sum

of $150.00 and to attorney for bankrupt, Leo Francis in the sum of $50.00 on account, and to trustee on account of commissions $40.00. Allowance on account of compensation to Receiver is made in the sum of $75.00. Each of the said allowances are ordered paid from the funds of the estate in the hands of the Trustee.

Trustee's prayer for authority to institute certain suits for the recovery of preferences involved in the estate is granted.

Oct. 4, 30. Petition by attorney for petitioning creditors for allowance on account of fee.

Oct. 4, 31. Petition of petitioning creditors for return of expenses.

Oct. 6, 32. Order approving and confirming trustee's first account and report—for payment of expenses of administration accrued—making allowance and authorizing trustee to sue in the state court for the recovery of certain alleged preferences.

Oct. 28, 33. Application of creditor for call of meeting of creditors for the purpose of authorizing trustee to oppose discharge of Bankrupt, D. L. Francis.

Oct. 28, Ordered that meeting of creditors be held on Nov. 8, 1930, at 10 o'clock A. M.

Oct. 28, 34. Notice of meeting of creditors Nov. 8th mailed to all creditors.

Nov. 8, Meeting of creditors held pursuant to notice mailed to creditors dated Oct. 28, 1930.

Present: The Trustee by counsel. Thos. W. Nealon and creditors present and represented as shown by authorization of trustee by creditors filed herein, totaling 18.

The Trustee is authorized to oppose the discharge of the bankrupt D. L. Francis by a unanimous vote of all claims filed and represented at the meeting being 18 in number and aggregating in amount the sum of $31068.73, said authorization being in writing and signed and filed herein.

Nov. 8, 35. Authorization of Trustee by creditors to oppose bankrupt's discharge.

Nov. 8, (Referee's certificate of meeting of creditors authorizing Trustee to oppose discharge filed with clerk U. S. Dist. Court.)

Feb. 18, 36. Stipulation as to scope of appeal.

Apr. 2, 37. Petition for disclaimer.

May 5, 38. Answer of Trustee to petition for disclaimer filed by McGinty Construction Company and Standard Manufacturing Co.

Form 831C—Proof of Unsecured Debt with Letter of Attorney. Order by Above description.

Dennis & Co., Inc., Publishers, Buffalo, N. Y. See Instructions on other side.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE PHOENIX DISTRICT OF ARIZONA DIVISION

IN THE MATTER OF
LEO FRANCIS, D. FRANCIS AND LYON FRANCIS A COPARTNERSHIP DOING BUSINESS UNDER THE FIRM NAME OF PHOENIX PLUMBING & HEATING COMPANY *Bankrupts.*

IN BANKRUPTCY No. .....

STATE OF ARIZONA
COUNTY OF MARICOPA } SS.

At Phoenix in the Phoenix District of Arizona on the 21st day of June 1930 came R. C. Bower of Phoenix in the county of Maricopa in the said district of Arizona and made oath

(1) That he is the authorized agent of STANDARD SANITARY MANUFACTURING CO. of Pittsburgh in the county of Pittsburgh and state of Pennsylvania duly authorized to transact business in the state

of Arizona and with its usual place of business in Phoenix, Arizona.

(4) That the said Bankrupts the persons for whom a petition for adjudication of bankruptcy has been filed, was, at or before the filing of said petition, and still is, justly and truly indebted to said Standard Sanitary Manufacturing Company in the sum of ..... dollars ($12,658.59).

(5) That the consideration of said debt is as follows: Plumbing supplies and materials furnished to the said Phoenix Plumbing & Heating Co. a copartnership on open account, at the special instance and request and under purchase orders of the said alleged bankrupts. An itemized statement, together with the receipts thereon being attached hereto and made a part hereof.

(5a) That the date of maturity of said debt is up to and including the 30th day of August, 1929.

(5b) That no note has been received nor judgment recovered therefor (*except* No exceptions.

(6) That no part of said debt has been paid (*except* the sum of $10,000.00.

(7) That there are no set-offs or counter claims to the same (*except* There are no offsets or counter claims to the same.

(8) That said creditor has not, nor has any person by order of said creditor, or to the knowledge or belief of said deponent for the use of said creditor, received any manner of security for said debt whatever (*except the following which are the only securities held by said creditor for said debt* None

(9) That this deposition is not made by the claimant (nor if it has been hereinbefore stated to be a corporation by its treasurer) in person because Standard Sanitary Mfg Co is a corporation and that deponent is duly authorized by his principal to make this deposition and that it is within his knowledge that the debt hereinbefore mentioned was incurred as and for the consideration, and said creditor is constituted as herein above stated.

Filed June 24, 1930.

R. W. Smith,
Referee.

(18)

H. M. Clark Office Supply Company

(10) LETTER OF ATTORNEY to Armstrong, Lewis & Kramer Attorney-at-Law. You or any one of you are hereby authorized by said creditor by the person making the foregoing deposition, who is duly authorized thereto, to appear for and represent said creditor and vote for said creditor in any proceedings, or meetings, which may be had or called in the above entitled proceeding, in court, before the referee in bankruptcy or elsewhere, and particularly to vote for said creditor in the choice of a trustee of said bankrupt whenever such selection is held, to accept or in your discretion oppose confirmation of, any composition offered by or in behalf of said bankrupt, and to receive and receipt for any and all moneys which may be, or may become, payable to said creditor therein for or on account of said debt.

In witness whereof said creditor has hereunto signed its name and affixed ..... seal, when signing the deposition preceding, the 23rd day of June 1930.

Subscribed, sworn to and acknowledged before me this 23rd day of June 1930 by the subscriber who (is per-

sonally known to me) or (has satisfactorily proved his identity).

R. C. Bower (L. S.)

(Seal)

Standard Sanitary Mfg. Co. (L. S.)
Creditor

By R. C. Bower

(Seal)

Gladys Parry
Notary Public

My Com. expires Oct. 29, 1933.

STATEMENT AND ITEMIZED ACCOUNT OF INDEBTEDNESS OWED TO THE STANDARD SANITARY MANUFACTURING COMPANY FROM THE PHOENIX PLUMBING AND HEATING COMPANY, a copartnership.

Total amount of the general account due for plumbing supplies and material furnished the Phoenix Plumbing and Heating Company by the Standard Sanitary Manufacturing Company up to and including the month of August 1930	$22,658.59
Received of the Southern Surety Company, Surety on the bond of the Phoenix Plumbing & Heating Company, contractors, on account of materials furnished in City Hall job upon the completion thereof	10,000.00
Balance due upon the itemized statement attached hereto and made a part hereof	$12,658.59

(Invoices covering above amounts attached to original claim in file not copied here.)

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA FOR THE DISTRICT OF ARIZONA

In the Matter of the

PHOENIX PLUMBING AND HEATING COMPANY, a Copartnership Composed of Leo Francis, Lyon Francis and D. L. Francis, copartners, and Leo Francis, D. L. Francis and Lyon Francis, as Individuals,

Bankrupts.

No. B-522 Phoenix

ELECTION OF TRUSTEE BY CREDITORS.

At Phoenix, in said district on the 24th day of June, 1930, before R. W. Smith, Referee in Bankruptcy:

This being the day appointed by the Court for the first meeting of creditors in the above bankruptcy, and of which due notice has been given in the *Messenger* by publication and by mail to all creditors as required by

law, we whose names are hereunder written being the majority in number and in amount of claims of the creditors of the said bankrupt, whose claims have been allowed, and who are present at this meeting, do hereby appoint WILLIAM L. HART, of Phoenix, in the county of Maricopa, and state of Arizona, to be the trustee of the said bankrupt's estate and effects.

Signature of creditors	Residence	Amount of claims
Momsen Dunnegan & Ryan,	El Paso, Texas	486.08
Union Oil Co of Cal	Phx	384.55
Pratt Gilbert Co	Phx	73.31
Gila Valley Pl & H. Co.	Safford	11.99
Welker & Son Transfer Co	Safford	165.41
Standard Ins. Co.	Phx	226.32
Comm'l Nat'l Bank	Phx	6100.00
Southwest Sash & Door Co	Phx	23.45
Phx Ariz Club	Phx	45.00
Mathews Paint Co	Phx	73.10
M & M. Welding Co	Phx	38.60
Heinze Bowen & Harrington	Phx	29.25
I Diamond and N. Diamond	Phx	16.82

By Alice M. Birdsall,
Their Attorney

American Bonding Company of Baltimore a corporation $15,738.95

By J. L. B. Alexander,
Their Attorney

Signature of Creditors	Residence	Amt of Claim
Standard Sanitary Mfg Co	Phoenix	12,868.00
Union Oil Co.		284.00

By Armstrong, Lewis & Kramer,
Their Attorney

Filed June 24, 1930
R. W. Smith,
Referee

(11)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ARIZONA

In the Matter of

PHOENIX PLUMBING AND HEATING COMPANY, a Copartnership Composed of Leo Francis, Lyon Francis and D. L. Francis, copartners and Leo Francis, D. L. Francis and Lyon Francis, as Individuals,

Bankrupts.

IN BANKRUPTCY No. B-522- Phoenix.

MINUTES OF FIRST MEETING OF CREDITORS HELD June 24, 1930, at 9 A. M.

Present:

Bankrupts Lyon Francis and D. L. Francis by counsel O. E. Phlegar, Esq.
Leo Francis by counsel O. E. Schupp, Esq.,

Creditors as follows:

Standard Sanitary Mfg. Co. by Armstrong, Lewis and Kramer.
Rio Grande Oil Co. by Armstrong, Lewis and Kramer.
American Bonding Co. of Baltimore by J. L. B. Alexander, Esq.

Momsen-Dunnegan-Ryan Co.	Alice	M.	Birdsall
Union Oil Co.	"	"	"
Pratt-Gilbert Hardware Co.	"	"	"
Gila Valley Plbg. & Htg. Co.	"	"	"
Welker & Son Transfer Co.	"	"	"
Standard Insurance Agency	"	"	"
Com'l National Bank of Phoenix	"	"	"
So. Wes. Sash & Door Co.	"	"	"
Phoenix Arizona Club	"	"	"
Mathews Paint Co.	"	"	"
M. & M. Welding Co.	"	"	"
Heinze, Bowen & Harrington	"	"	"
I. Diamond and N. Diamond	"	"	"

All claims represented voted for William L. Hart of Phoenix, for Trustee, and the same elected. Bond fixed at $1,000.00.

Meeting continued to June 25, 1930, at two P. M.

W. M. SMITH,
Clerk.

Filed June 24, 1930.

R. W. SMITH,
Referee.

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA FOR THE DISTRICT OF ARIZONA

In the Matter of the

PHOENIX PLUMBING AND HEATING COMPANY, a Copartnership Composed of Leo Francis, Lyon Francis and D. L. Francis, copartners, and Leo Francis, D. L. Francis and Lyon Francis, as Individuals,

Bankrupts.

No. B-522 Phoenix

AUTHORIZATION OF TRUSTEE BY CREDITORS TO OPPOSE BANKRUPT'S DISCHARGE

At Phoenix, in said District, on the 8th day of November, 1930, before the Honorable R. W. Smith, Referee in Bankruptcy:

This being the day appointed by the court for a meeting of creditors in the above bankruptcy, for the purpose of considering the matter of authorizing the trustee to oppose the bankrupt's discharge, and of which due notice has been given, we, whose names are hereunder written, being the majority in number and amount of claims of the creditors of the said bankrupt, whose claims have been allowed, and who are present at this meeting, do hereby authorize the trustee, William L. Hart, to oppose the discharge of said bankrupt.

Signature of Creditors	Amount of Debt
Momsen-Dunnegan-Ryan Company	$486.08
Union Oil Company	384.55
Pratt-Gilbert Hardware Company	73.31
Gila Valley Plumbing and Heating Company	11.99

Filed Nov. 8, 1930
R. W. SMITH, *Referee*

(35)

Signature of Creditors	Amount of Debt
Welker and Son Transfer Company	$ 165.41
Standard Insurance Agency	226.32
Commercial National Bank	6100.00
Southwestern Sash and Door Company	23.45
Phoenix, Arizona Club	45.00
Mathews Paint Company	73.10
M & M Welding Company	38.60
Heinze-Bowen-Harrington Company	29.25
I. Diamond and N. Diamond	16.82

By ALICE M. BIRDSALL,
Their Attorney

American Bonding Co. of Baltimore $15262.24

By J. L. B. ALEXANDER,
Its Attorney

Rio Grande Oil Co. 295.71
Standard Sanitary Mfg. Co. 12658.59
ARMSTRONG, KRAMER, MORRISON & ROCHE,
By F. J. DUFFY
Southern Surety Co. 10,000.00
Southern Surety Co.
By CLARK & CLARK By FRANK J. DUFFY 440.55
Their Attorneys

$31,068.73

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF ARIZONA

STATE OF ARIZONA }
COUNTY OF MARICOPA } SS.

I, R. W. SMITH, Referee in Bankruptcy for the District of Arizona, with my principal office at Phoenix, Arizona, do hereby certify and attest that the matter of adjudication in Bankruptcy of Phoenix Heating & Plumbing Company, a copartnership composed of Leo Francis, Lyon Francis and D. L. Francis, copartners, and of Leo Francis, Lyon Francis and D. L. Francis, as individuals, being No. B-522-Phoenix, was referred to me by F. C. Jacobs, United States District Judge for the District of Arizona, on the *10th* day of June, 1930; and I hereby further certify and attest that the copies hereto attached consisting of ten sheets beside this are true copies of records filed in my office and entries made in my books as such Referee; and I further certify that all entries made in my docket were made by me personally or under my supervision; that I have carefully compared the foregoing copies with the originals in my office, and that the same are true copies as the same appear on file and of record in my office.

IN WITNESS WHEREOF I have hereunto set my hand at Phoenix, Maricopa County, Arizona, this *9th* day of May, 1931.

R. W. Smith,
Referee in Bankruptcy.

Signature of Creditors	Amount of Debt
Momsen-Dunnegan-Ryan Company	$486.08
Union Oil Company	384.55
Pratt-Gilbert Hardware Company	73.31
Gila Valley Plumbing and Heating Company	11.99

Filed Nov. 8, 1930
R. W. Smith, *Referee*

(35)

Signature of Creditors	Amount of Debt
Welker and Son Transfer Company	$ 165.41
Standard Insurance Agency	226.32
Commercial National Bank	6100.00
Southwestern Sash and Door Company	23.45
Phoenix, Arizona Club	45.00
Mathews Paint Company	73.10
M & M Welding Company	38.60
Heinze-Bowen-Harrington Company	29.25
I. Diamond and N. Diamond	16.82

By Alice M. Birdsall,
Their Attorney

American Bonding Co. of Baltimore $15262.24

By J. L. B. Alexander,
Its Attorney

Rio Grande Oil Co. 295.71
Standard Sanitary Mfg. Co. 12658.59
Armstrong, Kramer, Morrison & Roche,
By F. J. Duffy
Southern Surety Co. 10,000.00
Southern Surety Co.
By Clark & Clark By Frank J. Duffy 440.55
Their Attorneys

$31,068.73

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF ARIZONA

STATE OF ARIZONA }
COUNTY OF MARICOPA } SS.

I, R. W. SMITH, Referee in Bankruptcy for the District of Arizona, with my principal office at Phoenix, Arizona, do hereby certify and attest that the matter of adjudication in Bankruptcy of Phoenix Heating & Plumbing Company, a copartnership composed of Leo Francis, Lyon Francis and D. L. Francis, copartners, and of Leo Francis, Lyon Francis and D. L. Francis, as individuals, being No. B-522-Phoenix, was referred to me by F. C. Jacobs, United States District Judge for the District of Arizona, on the *10th* day of June, 1930; and I hereby further certify and attest that the copies hereto attached consisting of ten sheets beside this are true copies of records filed in my office and entries made in my books as such Referee; and I further certify that all entries made in my docket were made by me personally or under my supervision; that I have carefully compared the foregoing copies with the originals in my office, and that the same are true copies as the same appear on file and of record in my office.

IN WITNESS WHEREOF I have hereunto set my hand at Phoenix, Maricopa County, Arizona, this *9th* day of May, 1931.

R. W. Smith,
Referee in Bankruptcy.

UNITED STATES OF AMERICA,
STATE OF ARIZONA,
COUNTY OF MARICOPA. } SS.

I, J. LEE BAKER, Clerk of the District Court of the United States for the District of Arizona, do hereby certify that R. W. SMITH, whose signature appears to the foregoing certificate was, at the time of signing the same, and is now, the duly appointed, qualified and acting Referee in Bankruptcy, in the District Court of the United States for the District of Arizona, for and including the County of Maricopa, Arizona; that I am well acquainted with his signature and know that the signature appearing on said certificate is the genuine signature of said R. W. Smith.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Phoenix, Arizona, on this 15th day of May, 1931.

(Seal)

J. LEE BAKER,
Clerk of the District Court of the United States for the District of Arizona.

By .....
Deputy Clerk.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

STANDARD SANITARY MANUFACTURING COMPANY, a Corporation, *Appellant,* *v.* MOMSEN-DUNNEGAN-RYAN COMPANY, a Corporation; PRATT-GILBERT HARDWARE COMPANY, a Corporation; UNION OIL COMPANY OF ARIZONA, a Corporation; PHOENIX PLUMBING AND HEATING COMPANY, a Copartnership Composed of LEO FRANCIS, LYON FRANCIS and D. L. FRANCIS, Copartners; LEO FRANCIS, LYON FRANCIS and D. L. FRANCIS, as Individuals; WILLIAM L. HART, as Trustee in Bankruptcy of the Phoenix Plumbing and Heating Company, a Copartnership Composed of LEO FRANCIS, LYON FRANCIS and D. L. FRANCIS, copartners, Bankrupts, and CRANE COMPANY, a Corporation, *Appellees.*	No. 6416

BRIEF OF APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA.

ALICE M. BIRDSALL,
THOMAS W. NEALON,
Attorneys for Appellees.

THE MANUFACTURING STATIONERS INC. PHOENIX, ARIZONA

TOPICAL INDEX

TABLE OF CASES CITED

STATUTES CITED

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

STANDARD SANITARY MANUFACTURING COMPANY, a Corporation, *Appellant,* *v.* MOMSEN-DUNNEGAN-RYAN COMPANY, a Corporation; PRATT-GILBERT HARDWARE COMPANY, a Corporation; UNION OIL COMPANY OF ARIZONA, a Corporation; PHOENIX PLUMBING AND HEATING COMPANY, a Copartnership Composed of LEO FRANCIS, LYON FRANCIS and D. L. FRANCIS, Copartners; LEO FRANCIS, LYON FRANCIS and D. L. FRANCIS, as Individuals; WILLIAM L. HART, as Trustee in Bankruptcy of the Phoenix Plumbing and Heating Company, a Copartnership Composed of LEO FRANCIS, LYON FRANCIS and D. L. FRANCIS, copartners, Bankrupts, and CRANE COMPANY, a Corporation, *Appellees.*	No. 6416

BRIEF OF APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA.

NATURE OF THE CASE

This is an appeal sought to be prosecuted, not from an Order of Adjudicatian of Bankruptcy, but from two Findings of Fact and one Conclusion of Law based thereon, contained in the report of the Special Master to whom a contest on the matter of adjudication of an involuntary petition in bankruptcy filed against the Phoenix Plumbing and Heating Company, a copartnership and the three individual members thereof, had been referred by the Judge of the District Court for the District of Arizona. The involuntary petition in bankruptcy joined in by Momsen-Dunnegan- Ryan Company, a corporation, Pratt-Gilbert Hardware Company, a corporation, and Union Oil Company of Arizona, a corporation, all creditors, holding unsecured claims against said copartnership, had alleged numerous Acts of Bankruptcy, consisting of preferential payments made to different creditors while debtors were insolvent and within four months preceding the filing of the petition. The appellant herein, a creditor, had intervened, filing an answer denying these acts of bankruptcy. Two of the alleged copartners had answered, denying they were partners, but admitting the insolvency, and the other alleged partner had answered admitting insolvency of the Phoenix Plumbing and Heating Company, and signifying his willingness to be adjudged a bankrupt, both individually and for the Phoenix Plumbing and Heating Company. The Special Master having made his report to the court, finding three separate Acts of Bankruptcy to have been committed, one involving a preferential payment to the appellant herein, and the other two involving preferential transfers to another creditor, after hearing exceptions to the report filed by appellant herein, the District Judge confirmed the re-

port of the Special Master in toto and made an Order of Adjudication of Bankruptcy. Within thirty days thereafter appellant petitioned the Judge of the District Court for the allowance of an appeal from the Judgment "in-so-far as the same is affected by the said objections" (referring to the Objections filed by it to the Master's Report, all referring to the alleged preferential payment found by the Master to have been made to the Standard Sanitary Manufacturing Company) and on the 10th day of June, 1930, (T. R. 34) the District Judge allowed said appeal as sought and Citation was made to the appellees herein to show cause "why the Judgment of said court overruling the Standard Sanitary Manufacturing Company's objections to the Special Master's report and the Order of Adjudication in Bankruptcy of the Phoenix Plumbing and Heating Company, in-so-far as the same is affected by the said objections should not be corrected" (Transcript, page 653).

No attempt was made by the appellant to stay the administration of the bankrupt estate, and no supersedeas bond was filed, but only a cost bond (Transcript, page 638). No application for allowance of an appeal was made to the Circuit Court of Appeals and no order allowing appeal has been made by this court.

As to the two Acts of Bankruptcy found by the Special Master to have been committed by the bankrupts involving preferential transfers within the four months' period to a creditor other than the appellant herein, the appellant has assigned no errors, (Transcript, page 628) but on the contrary has filed in this Appeal stipulation as to the Scope of this Appeal in which appellant has admitted and stipulated as to such Acts of Bankruptcy, that they were "sustained by competent evidence free

from all legal objections". (See Stipulation in Brief of Appellee's Motion to Dismiss or Affirm, pages 2-4).

In its brief filed herein, the appellant has referred to this stipulation as limiting the Scope of the Appeal prosecuted to the two Findings in the Special Master's report involving the preferential payment to appellant, and the one Conclusion of Law in said Special Master's report based thereon, and has reiterated that no appeal has ever been sought from the Order of Adjudication of Bankruptcy as of the date of the filing of the involuntary petition, and the only relief asked for is a "declaration" of this court that the payment made to this appellant within the four month period prior to said date, was "not a preferential payment and not an act of Bankruptcy."

This appeal is, therefore, limited to a question of the review by this court of the correctness of certain Findings of the Special Master, which were confirmed by the District Court when it confirmed the Master's report as a whole without attempting to disturb the confirmation of said Master's Report as covering other acts of Bankruptcy and without disturbing the Order of Adjudication based thereon.

Petition for appeal (T. R. 627);
Citation on appeal (T. R. 653);
Brief of appellees (page 7-8);
Stipulation as to Scope of Appeal.

(Appellees' Brief on Motion to Dismiss or Affirm, pages 2-4; Original filed in this court.)

ISSUES

The question raised by the Assignments of Error of Appellant herein is the correctness of the ruling of the District Court confirming two Findings of Fact and one Conclusion of Law based thereon contained in the Report of the Special Master, all relating to one transaction between Appellant and Bankrupts which the Master found to have constituted one Act of Bankruptcy and the issues to be determined thereunder are:

I. Can this appeal, conceded to be limited to a review of part of a judgment only, as same relates to one transaction found to be an Act of Bankruptcy and not affecting the Adjudication of Bankruptcy and the Findings on other Acts of Bankruptcy, be prosecuted under the provisions of Section 25 of the Bankruptcy Act?

II. In view of the fact that two Acts of Bankruptcy (Master's Findings Nos. 14 and 15, T. R. P. 22) not appealed from are conceded by Appellant to be sustained by competent evidence and no appeal being taken from the decree of Adjudication, does the correctness of the Findings respecting a third Act of Bankruptcy present any present controversy to this court for determination?

III. Did the evidence sustain the Master's Findings Nos. 5 and 16 establishing an Act of Bankruptcy respecting the transaction with appellant, in

a—Were bankrupts insolvent at the time of the transfer?

b—Did bankrupts have knowledge of their insolvency?

c—Did the transfer give appellant a larger proportion of the assets than other creditors of same class would receive?

d—Was transfer of $13,000.00 to appellant made within four months' period?

IV. Were the Findings of Facts Nos. 5 and 16 sufficient to justify the Master's Conclusion of Law No. 4?

STATEMENT OF FACTS

The appellees herein cannot and do not accept the statement of facts set up in appellant's brief as correct in any respect. So totally erroneous, misleading and confusing is it, that it is impossible to amend same, and appellees therefore present what they deem a complete and correct statements of facts, verified by references to the record, as follows:

At the time of the filing of the petition in bankruptcy, the liabilities of the bankrupts, amounted to $70,-571.59. According to the schedules filed by Leo Francis (T. R. 333) the assets consisted of:

Plumbing fixtures and supplies (T. R. 364)	$2,117.20
Household goods	50.00
Motor vehicles	400.00
Machinery and tools (T. R. 134)	177.30
Debts due on open account, nominal value $3,724.24, actual value not over 10% of such amount	372.42
Total	$3,176.92

Then there are what they have called "unliquidated claims" amounting to $35,658.79 (T. R. 135). These "unliquidated claims" are principally amounts claimed to be due upon unfinished contracts and are liabilities instead of assets, because contracts taken at too low a

price and consequent failure of the bankrupts to complete their contracts. These buildings and contracts therefor have been taken over for completion by various bonding companies (See T. R. pages 125, 126 and 127). Among these claims, which are listed as assets but which are liabilities, are claims against the following:

City of Phoenix (job taken over by Southern Surety Co., bondsmen for completion)	$ 8,707.85
Green & Hall, Schwentker residence (job taken over by Massachusetts Bonding Company)	1,334.00
Phoenix Union High School District (taken over by Massachusetts Bonding Company)	3,507.10
Phoenix Union High School District, Junior College job (an uncompleted job)	2,106.00
Phoenix Union High School District, Library and Class Room Building (job taken over by American Bonding Company for completion)	9,410.12
Total	$25,065.07 (T. R. 125)

So that the total available assets at the time of the filing of the petition in bankruptcy amounted to only $13,-770.64, and of this amount a large portion is uncollectible. This is based on the schedules filed on behalf of the Phoenix Plumbing and Heating Company and Leo Francis (see T. R. page 125 entitled "Unliquidated

Claims"). In addition to these is the Baschowitz claim which is a total of either $2,600.00 or $3,700.00 (T. R. 323).

The business of the bankrupts was in operation for a period of about twenty-three months, from October, 1927 to August 17, 1929 (T. R. 365 and page 4), and the total loss for said period was in excess of $56,800.95, and on August 17th, 1928, their assets exceeded their liabilities by that amount.

The three bankrupts came to Phoenix in the latter part of 1927 (T. R. 365, 429). At that time they had a cash capital of not more than $1,000.00 (T. R. 357, 365), of which $800.00 was contributed by Leo Francis, (T. R. 352); possibly Lyon Francis contributed $200.00 more. After D. L. Francis came to Phoenix, $1,800.00 was sent to him by Leo (T. R. 352), who had borrowed $1100.00 from his father (T. R. 352). D. L. Francis then borrowed $450.00 from Joe Thomas during the month of September or early part of October (T. R. 366). D. L. Francis was drawing wages of $55.00 per week out of this capital. He started the Sunshine Plumbing Company and spent $50.00 in this venture. On the 29th day of September, 1927, they opened their bank account and placed therein their capital and borrowed money in the sum of $2,150.00 (T. R. 147, 148). The account was with the Commercial National Bank and in the name of the Sunshine Plumbing Company.

On October 5, 1927, they purchased from William Remsbottom his plumbing business for the sum of $3,600.00, plus a bonus for good will of $670.00, making a cash payment thereon of $1600.00, and leaving an indebtedness to William Remsbottom of $2,670.00 (T. R.

366, 367, 368, and financial statement T. R. 85). All their capital was exhausted and they were actually insolvent by the 10th of October, 1927, as shown by tabulation below.

Preliminary expenses (See Bank account T. R. 147)	$ 43.48
Deducted from Leo's capital prior to sending it to D. L. Francis for investment at Phoenix	100.00
Amount paid and agreed to be paid for the good will of Remsbottom business	670.00
Amount spent in Sunshine venture	50.00
Amount drawn by D. L. Francis, $45.00 per week in September and up to 10th of October	270.00
Making a total of expenditure to that date of	$1133.48

and an actual insolvency of $133.48 (T. R. 368). A true statement of their actual condition on October 15th, ten days after the purchase of the Remsbottom business was as follows:

(T. R. 367 to 369, inc.) (Financial Statement of October 15, 1927, T. R. 85 as corrected by the testimony). Assets:

Cash on hand	$ 258.54
Value of property acquired from Remsbottom	3600.00
Total assets	$3858.54

Liabilities:

To William Remsbottom	$2670.00	
To father of bankrupts	1100.00	
To Joe Thomas for money borrowed	400.00	
Total liabilities	$4170.00	
Excess of liabilities over assets		311.46
		$4170.00

On this date, October 15, 1927, they made a statement to the Commercial National Bank (T. R. 83) in which they showed a net worth of $4844.54, though actually insolvent at the time. This result was shown by padding the value of property they had acquired from Remsbottom. That which they had purchased for $3600.00, they put in this statement as of the value of $7256.00 (T. R. 84), viz:

Notes receivable	$1,056.00
Salable merchandise	3,700.00
Machinery and tools	2,500.00
	$7,256.00

Upon the liability side of their statement they omitted to list the indebtedness for money borrowed from their father of $1100.00 and the money borrowed from Joe Thomas of $800.00; so that their liabilities should have been $4570.00 instead of $2670.00 as shown thereon (T. R. 85). This statement according to their figures, shows a net gain of nearly 400% in 10 days time.

After issuing this statement, and prior to April 1928, they suffered a further loss of $3700.00 from their listed

assets (T. R. 344) in the loss upon the Bashovitch job (this while carried at $3700.00 was probably an actual loss of $2600.00). The loss was complete the moment that the material was upon the premises and the labor furnished, in that there was a first mortgage of $4700 upon the lot before the building was erected, (T. R. 151-159) which was eventually foreclosed and no recovery whatsoever was made for the debt due the bankrupts, or other contractors.

On April 2, 1928, while they were actually insolvent and their liabilities exceeded their assets in a sum of not less than $4,000 they, for the purpose of obtaining credit from the Commercial National Bank made a statement to that bank in which they showed a net worth of $12,-127.80 (T. R. 86, 87, 88). No new capital had been put in the business at that time. The indebtedness of $1100.00 to the father of bankrupts was omitted; the indebtedness of $400.00 to Joe Thomas was omitted, and the indebtedness to William Remsbottom was also omitted. If the figures they presented in this statement were correct, they had during a period of less than six months earned more than 1100% on the original capital invested. Apparently these figures were arrived at by padding the amount of salable merchandise on hand and listing as assets uncompleted contracts of $19,012.10, (T. R. 86) and on none of these contracts does there ever appear from their books, or otherwise, or in their testimony, any profits realized whatsoever. On the contrary the loss on contracts and other business for these 23 months in which they were in business, showed a loss of an amount in excess of $56,800.00. (T. R. 4 and 365). A true statement at that time would have disclosed that the bankrupts were insolvent on April 2, 1928.

On May 31, 1928, they prepared another statement of their assets and liabilities (T. R. 89, 90, 91) which on August 18, 1928, was furnished to R. G. Dun & Company. This statement showed a net worth of $15,236.55, or a profit of more than $3,000.00 in less than 60 days time. From the statement of May 31st sent to R. G. Dun & Company on August 18th, 1928, there was omitted from the liability side the indebtedness to Remsbottom, the indebtedness to the bankrupt's father and the indebtedness to Joe Thomas.

In order to show assets in excess of liabilities they listed upon the asset side of the statement an item of $14,373.00 as due on contracts (T. R. 90). This probably represents an anticipated profit which never materialized, as it does not appear that upon any of their contracts they ever made profits. They listed their hopes and expectations as cash assets while taking contracts for less than the cost of construction.

Upon the above false statement they were able to procure a good credit rating from R. G. Dun & Company (G 3) and thus incur large liabilities. (T. R. 91).

In the latter part of 1929, there was prepared by the Southwest Audit Company, of which Mr. Jerry Lee is a member, a financial statement taken from the books and records of the bankrupts, as far as the same were available, and supplemented and checked back with other public records so far as this was practicable showing condition of bankrupts as of April 30, 1929. This statement (T. R. 197, 198) shows an excess of liabilities over assets of $30,165.82. This amount was increased by the 17th of August, 1929, at the time that the second audit was made by the same firm of auditors to $43,716.06 (T. R. 196).

Complaint is made by the appellant in its brief that this audit is incorrect; but an examination of the record shows that Mr. Lee gave the benefit of the doubt in every instance to the bankrupts.

Of the uncompleted jobs on hand and which were considered assets by the bankrupts and so reported in all their statements, there was $25,065.07 that the final result shows to have been liabilities and not assets (T. R. 125 to 138).

A statement was made and furnished to the bank on June 22, 1929 (T. R. 234). This statement was prepared by Mr. Fretz, an employee of the bankrupts. It showed, if correct, a net worth of $5,718.79, but as appears from Mr. Fretz's testimony, (T. R. 361) he omitted from his statement the cost of materials and labor necessary to finish the outstanding contracts which he listed as having a value of $47,400.64. If we deduct the amount necessary to complete these contracts, which amounts to more than $18,945.00, we have the bankrupts as shown by their statements together with this correction to have been insolvent upon June 22, 1929, and their liabilities exceeded their assets by more than $13,226.21.

In the bankrupts' schedules sworn to on the 17th day of September, 1929, and which were made up to show the assets and liabilities as of August 17, 1929, the liabilities were put at $70,571.59, and the assets at $43,510.33, (T. R. 290 to 334) showing liabilities in excess of assets in the sum of $27,061.26 (T. R. 134, 135).

This is a strong confirmation of the audits made by the Southwest Audit Company on the two dates of April 2, 1929, and August 17, 1929. There should be deducted, however, from the assets in each of these audits a large sum for uncompleted contracts taken over by the bond-

ing companies. It therefore appears that the bankrupts were insolvent on:

October 10, 1927,
October 15, 1927,
April 2, 1928,
May 31, 1928,
April 30, 1929,
June 20, 1929,
July 22, 1929 and
August 17, 1929,

at which time, to-wit, August 17, 1929, creditors petition in bankruptcy was filed. And nowhere in the record do they appear to be solvent, nor does there appear in the record any transaction that shows a profit to the bankrupt firm.

About the 1st of January, 1929, if not before, the members of the bankrupt firm realized that they were in an insolvent condition and never would be able to pay their debts, and about this time they commenced to withdraw their funds from the business as rapidly as they could, paying as little as possible to their creditors. We point out a number of these withdrawals of large amount, to-wit:

January, 1929	Leo Francis	$ 400.00	(T. R. 357)
	Father of Leo Francis	700.00	(T. R. 353)
	Joe Thomas	2100.00	(T. R. 388)
	D. L. Francis		
	Arizona Garment Co.		

These last two items are very large but cannot be ascertained because of destruction of books.

That this condition became apparent also to Mr. Nihel, the manager of the appellant's business, appears also, for he commenced taking assignments of accounts and watching the business very closely, even suggesting that D. L. Francis be removed from his position as manager and Mr. Fryberger substituted, and by taking other active steps in the management of the copartnership.

The withdrawals of funds from the firm during the period from January 1, 1929 to April 22, 1929, were sufficient to break the company if it had not been insolvent prior thereto, and on this last date a convenient fire occurred; that it was of incendiary origin is shown in the testimony of the two police officers who examined the premises (T. R. 284 to 288). The fire was started with a slow fuse. The door of the safe was left unlocked and books left outside, but because the combustibles were not properly arranged for a fire, there came an explosion which blew the door off the safe and put out the fire (T. R. 284-288). Some of the books were taken away by the bookkeeper, one Gehres, prior to the explosion. Another, in a badly torn condition, is before this court, as an original exhibit. Portions of the cash book disclosing the transactions for the first four months of 1929 are missing. Between 9 and 9:30 on the night of the fire, D. L. Francis was on the premises and Paul Gehres was there at about the same time. The explosion occurred a little later that night after the candle attached to the fuse had burned down.

For some time, approximately 60 days prior to the appointment of the receiver, no deposits were made in the bank by the bankrupt firm. (T. R. 554). The bankrupts kept no books which would show their assets and liabilities; the money due the father of the bankrupts never ap-

peared on the books, nor did the money loaned from Joe Thomas. A contracts receivable book was kept which showed the amount of the contracts, but nothing was kept to show the purchases for carrying out the contracts, nor the amounts necessary to complete the various jobs. $2100.00 was paid to Thomas in March and April (T. R. 388). Check stubs from December 11, 1928 to April 13, 1929, were missing (T. R. 552). This is the critical period when the firm's cash was disappearing.

No notice was given to any of the creditors of the bankrupt of the alleged assignment of moneys due on the various contracts. (T. R. 428). Bankrupt stated to Mr. McNichol (T. R. 571) that no assignments had been made.

The Master's report finds that the bankrupt committed three acts of bankruptcy (Paragraph 14 of Master's Report, T. R. 22 and 23; Paragraph 15 of Master's Report, T. R. 23 and 24; Paragraph 16 of Master's Report, T. R. 24; these being the findings of fact). The conclusions of law to the same effect appear in Conclusions 2, 3 and 14 (T. R. 25). It is the last of these items and only one that the appeal is directed to. This last item is set up in the creditor's petition on page 8 thereof and the assignment is to the effect that at a date subsequent to June 1, 1929, and while insolvent, bankrupts transferred a portion of their property, to-wit, money in the sum of $13,000 to the appellant with intent to prefer it over other creditors. The payment was actually made to the appellant on June 9th, 1929, and appears upon the cash book of the bankrupt as of that date (T. R. 625, 626, 441, 442). On June 8th, the Lincoln Mortgage Company issued its check for $14,000.00 to the Phoenix Plumbing & Heating Co. (T. R. 599, 600 and 601). The item was

cashed by C. B. Fryberger, then manager for the Phoenix Plumbing and Heating Co. (T. R. 440). At that time the Phoenix Plumbing and Heating Company was insolvent (T. R. 197). It had been insolvent from the date of its opening business in Phoenix after the purchase of the business from William Remsbottom (T. R. 365). The total capital of the partnership, $800.00 or $1,000.00, had been used in preliminary expenses and liabilities of the partnership exceeded the assets by $30,165.82.

That the so-called assignment of contract of March 5, 1929, (Exhibit C, T. R. 236) was concealed, is shown from the fact that bankrupt, D. L. Francis, stated to the officials of the Commercial National Bank on May 14, 1929, that no assignments had been made. This was at the time that he made application for the loan of $1,000 made to the bankrupt partnership on May 15th (T. R. 279). There were various transactions with the bank during May, 1929, loans increased, which would not have been made had the fact of these assignments not been concealed from the bank, and by virtue of this deceit the bank lost the money that they lent upon the faith of the bankrupt's statement that no assignment had been made.

Another act of concealment was the sum of $14,000 collected from the Lincoln Mortgage Company, which was kept out of the regular channels of business and not deposited in the bank account. (T. R. 442, 443). On June 22nd when Nihel was present at the bank and he and the officials of the bank were figuring out conditions of the bankrupt to see whether it woud justify a further extension of credit, Nihel, Manager for the Appellant, did not mention that his firm had any assignments whatsoever (T. R. 282). Nihel further says that he knows nothing of the assignment of May 7th (T. R. 592). Nihel

does not testify that the Lincoln Mortgage Company payment of June 8th was paid on account of this assignment (T. R. 594). While the witness, Nihel, testified (T. R. 596, 597) to various assignments of November 5, 1927, December 5, 1927 and four other assignments, he does not in all his testimony indicate that a dollar was ever paid to his firm upon any assignment held by them. It further appears that the first notice as to the assignment of December 5th (T. R. 596, 597) was accepted June 23rd, 1929, on the eve of bankruptcy when it had been disclosed to all that the firm was insolvent and this is the first indication and notice of, or acceptance of any assignment. Witness Nihel never testified that he received the assignment dated March 5, 1929, nor does it appear in the evidence anywhere as to the time of its delivery (T. R. 586-599).

The payment to the Standard Sanitary Mfg. Company on June 9, 1929, of $13,000.00 (found by the Court to be an act of bankruptcy) was paid by C. B. Fryberger, then manager of the bankrupt partnership by a cashier's check of the Citizens State Bank (T. R. 442). The payment appears upon their cash book as having been made to the Standard Sanitary Manufacturing Company in the amount of $13,000.00 on June 9, 1929 (T. R. 625). To whom the payment was made does not appear. The Phoenix Plumbing and Heating Company obtained the money out of which this sum was paid from a check or voucher payable to them for $14,000.00 which was delivered to Mr. Fryberger as manager, (T. R. 442). No representative of the copartnership was with him when he received the check or when he went to the Citizens State Bank and procured a cashier's check for $13,000.00 which he subsequently paid to the appellant (T. R. 442).

At the time that he received the check and at the time that he procured the cashier's check he was in full control and custody of the checks and funds, and as far as appears from the evidence he applied the funds according to his own judgment, using $1,000.00 for the payroll of the bankrupt corporation (T. R. 442). The voucher check of the Lincoln Mortgage Company does not recite that it was paid on an assigned account and it was not made payable to the alleged assignee, but on the contrary was made payable to the bankrupt partnership; it was recited that it was in payment of various jobs named, nor does it appear that at that time or at any other time the instrument claimed to be an assignment was delivered to them at the time that the $14,000.00 was paid, or at any other time (T. R. 599 to 602).

There does not appear from the evidence to have ever been a draft drawn upon the Lincoln Mortgage Company as provided for in the alleged assignment, nor any acceptance of any such draft, nor does it appear that any delivery was made of this instrument to any officer or employee of the Standard Sanitary Manufacturing Company, other than the testimony of Dee Francis, which the Master did not believe.

Mr. Nihel, the local manager of the appellant, was upon the stand and never claimed that the payment of $13,000.00 was paid under or by virtue of the instrument, nor did he claim that it had ever been in the possession of his company, nor that he had notified the Lincoln Mortgage Company that he had the same in his possession, nor that he ever drew any drafts as provided for in the instrument (T. R. 586 to 599); nor does the instrument correspond in form with any other purported assignment that appears in the record. Mr. Nihel did testi-

fy as to certain purported assignments as to other properties dated May 7, 1929; that he had never received them, did not know anything about them, remembered no negotiations with reference to them, and knew of no reason why they should have been taken, (T. R. 592).

The testimony of the bankrupts, Leo Francis and D. Francis, conflicts in material matters (that cannot be explained upon any theory of mistake) with the testimony of the following witnesses: Floyd M. Stahl (T. R. 430), C. L. Lane (T. R. 282), Frank McNichol (T. R. 565-571); with the bonds signed by them (T. R. 80), and with the solemn instruments acknowledged by them and placed upon the records of Maricopa County (T. R. 22, Finding 12), and many other instruments signed by them as shown by the record. These were upon the matter of partnership which was a material issue in the hearing, though not now appealed from, and the bankrupt Dee Francis, testimony is in sharp conflict with that of Mr. McNichol of the Bank in regard to the alleged assignments (T. R. 571). No notice of any of these assignments was ever given to any creditor of the bankrupt and was actively concealed from the Commercial National Bank by statements made to Mr. McNichol by Dee Francis (T. R. 571). He was attempting to procure a loan from the bank which he did actually obtain from the bank. Between the dates of April 30, 1929 and August 17, 1929, there was no improvement in the condition of the affairs of the bankrupt partnership. (T. R. 510). At the time this payment was made, the bankrupts' records show them to have been in an insolvent condition, and they would have known this fact from any examination of such records. (T. R. 393). As early as March they were being pressed by other creditors (T. R. 337,

346), and in May the appellants herein were pressing them vigorously for payment. Prior to the payment of this sum of money, they had been refused further credit by the Crane Company (T. R. 579-580), who had taken assignments of a large number of their contracts and then refused to furnish them further credit. They made no deposits in the bank between June 18, 1929 and August 17, 1929. (T. R. 554).

The affairs of the bankrupts were in such condition by July 1, 1929, that conferences were being held between Messrs. Nihel, Duffy, Armstrong and Townsend in regard to making an assignment for the benefit of creditors (T. R. 608). At that time a suit was threatened by Crane Company through its attorney, Mr. Fred Blair Townsend. (T. R. 612). The assignment, however, was never completed, probably owing to the fact that the Crane Company and the appellant insisted that the alleged assignments claimed by them prior to that date, should be expressly recognized in the assignment (T. R. 609). The proposed assignment appears as Exhibit No. 37 (T. R. 613). In the investigation precipitated by this action the various instruments purporting to be assignments heretofore concealed from the creditors by the bankrupt were brought to light and precipitated the filing of the petition in bankruptcy (T. R. 612).

BRIEF OF ARGUMENT ON APPEAL

ISSUE No. I

Right of Appeal

(a) Appellant cannot appeal from a specific finding of fact or conclusion of law under Section 25 of the

Bankruptcy Act, unless it appeals at the same time from the decree of adjudication, which, in this instance, it does not do and expressly disclaims any such intention in its brief. (See page 7 thereof.)

Bankruptcy Act, Section 25.

(b) If this appeal is allowable at all, it must be under Section 24 of the Bankruptcy Act and is allowable only by the Circuit Court of Appeals, which precedure was not followed in this case.

Bankruptcy Act, Section 24.

We do not argue this at length as it is fully developed in our brief upon our Motion to Dismiss or Affirm at pages 26-31 thereof, filed in this Court. We merely renew the argument at this point, so that it may not be considered that we have waived the motions or any of the rights set up therein.

ISSUE No. II

Where two acts of bankruptcy are admitted by appellant, it cannot complain of the decree of adjudication.

An order of the District Court affirming the findings of fact and conclusions of law of a Special Master as to an act of bankruptcy, cannot be set aside on appeal where there is no attempt to set aside the decree of adjudication and it is admitted that other acts of bankruptcy found by the Special Master are sustained by competent evidence free from all legal objections, and the appellant concedes in both stipulation and brief that the adjudication shall stand.

In this matter it is conceded that the adjudication should stand and by stipulation it is agreed that the scope

of the appeal shall be limited to the findings of fact and conclusion of law in regard to one act of bankruptcy, namely, that of the preferential payment of $13,000.00 to the Standard Sanitary Manufacturing Company, the decree of adjudication to remain undisturbed.

This is in harmony with the position of the appellant from the start as shown by its Petition for Appeal, (T. R. 627) Citation on Appeal (T. R. 653), Assignments of Error (T. R. 628), Stipulation as to Scope of Appeal (Brief on Appellee's Motion to Dismiss or Affirm, pages 2-4), and Appellant's Brief on Appeal, (pages 7 and 8).

(a) An adjudication of bankruptcy warranted by proof of an act of bankruptcy sufficiently alleged, may not be set aside because other alleged acts of bankruptcy were not properly pleaded or proved.

> "Even if it be true as contended by appellant that certain other alleged acts of bankruptcy, were not properly pleaded or proved, the fact is wholly immaterial upon this appeal. It is enough that sufficient was alleged and proved to warrant the adjudication."
>
> *In re Lynan, et al.,* (U. S. Cir. Ct. of Appeals, 2nd Cir. Nov. 24, 1903) 11 A. B. R. 466; 127 Fed. 123.

(b) The acts of bankruptcy admitted to have been proven and from which no appeal has been taken are shown in the report of the Special Master on pages 22, 23 and 24 of the Transcript of Record, and the Findings of Fact, being Nos. 14 and 15, and the Conclusion of Law, being Nos. 2 and 3, are shown on pages 24 and 25 of the Transcript of Record.

ISSUE No. III

Sufficiency of evidence to sustain the Master's findings, as affirmed by the Court.

The evidence is sufficient to sustain the Master's findings No. 5 and 16, establishing an act of bankruptcy respecting the transactions with appellant in that

(a) Bankrupts were insolvent at the time of the transfer of $13,000.00 to the appellant on June 10, 1929, and within four months prior to the filing of the schedules in bankruptcy as of August 17, 1929, appears from the following facts set up in the record:

1. Schedules of Leo Francis, bankrupt, as of August 17, 1929 (T. R. 290 to 334, inclusive);
2. Financial statement prepared by Southwest Audit Company showing financial condition of bankrupt as of August 17, 1929 (T. R. 196);
3. Financial statement prepared by Southwest Audit Company showing financial condition of bankrupt as of April 30, 1929 (T. R. 197);
4. Financial statement made by bankrupt to Commercial National Bank June 22, 1929 (T. R. 234), coupled with the testimony of Mr. Fretz as to omission of liabilities (T. R. 361);
5. Admissions, on bankrupt's examination, by Leo Francis that business was started in October, 1927, with a cash capital not to exceed $1,000.00 (T. R. 357, 365), and admissions of the bankrupts that the same was exhausted in preliminary expenses and purchase of good will within ten days after opening business in October, 1927. (T. R. 352, 357, 365, 366, 367, 368);

6. Analysis of the financial transactions of the bankrupts. (See portions of our Statement of Facts shown in this Brief on pages 6-21);

7. Loss of $3,700.00 on one contract prior to April, 1928, increasing the theretofore existing insolvency (T. R. 344, 151, 159);

8. Testimony of Jerry Lee, certified public accountant contract entered into by them during the period that they were in business (T. R. 500, 501);
that their records do not show a profit on a single

9. Admissions of bankrupt that creditors were pressing for money in March, 1929. (T. R. 346, 337) and May, 1929, (T. R. 418);

10. Draining of resources of bankrupt partnership by the bankrupts during a period when they are shown to be in a failing condition, namely, the period of five months preceding the incendiary fire (T. R. 388, 389), and the records of these transactions being destroyed by the incendiary fire (T. R. 285, 287).

Bankrupt having failed to produce its books showing its financial condition, the burden of proving insolvency fell upon the ~~petitioning~~ intervening creditor.

Remington (3rd Ed.) Vol. 1, Sec. 189-190, page 256.

"Destruction or loss of adequate books or failure to keep them is no excuse if the debtor fails to appear with books and records sufficient to determine the question of his solvency or insolvency. The burden is upon him to prove his solvency."
Remington (3rd Ed.) Vol. 1, Sec. 190.

In the case of *In Re Perlhefter and Shatz,* 25 A. B. R. 576 (177 Fed. 299), the court says:

> "On the other hand, however, I think that, even if the facts are not strictly in point the reasoning of In re West (C. C. A., 2d (Cir.), 5 Am. B. R. 734, 108 Fed. 940, 48 C. C. A. 155, controls this case. It is quite true that their solvency was an affirmative defense, while here it was a necessary allegation of the petition; but I do not believe that Congress meant an intervening creditor to be in a better position to combat adjudication than the bankrupt was, or that the petitioner's case was to become more difficult if a bankrupt absconded than if he stayed and fought. There is every reason to construe the act as putting the intervener in precisely the same position as the bankrupt, and no reason to the contrary."

See also:

Bogen & Trummell v. Protter, 12 A. B. R. 288; 129 Fed. 533;

Dummings Grocery Company v. Talley, 26 A. B. R. 484; 187 Fed. 507 (6th Cir.);

In Re Desha & Willfong, 38 A. B. R. 130;

Hollister v. Oregon Hardware Mills, 9 A. B. R. (N. S.) 137; 15 Fed. (2) 788; (citing with approval the case of Bogen v. Protter, supra).

In the case of the failure of the bankrupt to sustain the burden of proving his solvency after the shifting of the burden, the insolvency of the debtor will be presumed to have existed as of the earliest date alleged in the petition.

In Re Donnelly, 27 A. B. R. 504.

That the same rule applies as to intervenors is apparent from the citations from *Remington,* supra, and *In Re Perlhefter and Shatz,* supra.

In the following cases, proof of insolvency has been held sufficient where the evidence presented was considerably less than that shown in the Transcript of Record of the present case:

Matter of National Steamship Lines, 48 A. B. R. 356, (C. C. A. case). (A matter very much like the present case on the facts.);

Matter of Saludes Lumber Co., 47 A. B. R. 111. (Evidence held sufficient. Large number of assignments.);

Williams v. Platner, 17 A. B. R. (N. S.) 227;

Cleage v. Laidley, et al., (8th Cir.) 17 A. B. R. 598;

Reiter v. Bernstein, 1 A. B. R. (N. S.) 141; 28 Fed. 429;

Schwemer v. Milwaukee Com'l Bank, 5 A. B. R. (N. S.) 675; 201 N. W. 398;

In Re Dix, 46 A. B. R. 199, 267 Fed. 1016;

Abdo v. Townsend, 49 A. B. R. 148.

(b) The Transfer in this case gave to the appellant a much larger proportion of the assets than any other creditor of the same class will receive. This is apparent from an examination of the bankrupt's schedules wherein it is disclosed that the unsecured indebtedness amounts to a sum in excess of $22,000.00 (T. R. 134), and that the amount of available assets consist nominally of $[illegible] (T. R. 135). The actual value of these assets would be less than half of that sum.

"If the effect of the transfer is to enable the creditor to receive out of the debtor's estate a larger percentage of his claim than other creditors of the same class, it constitutes a preference."

Gilbert's Collier on Bankruptcy, page 839, and cases cited therein.

As the payment of this $13,000.00 depleted of necessity the estate of the bankrupt of this amount, and no other creditor appears to have received any proportionate sum on his claim, the conclusion is inevitable that the estate was depleted to the extent of $13,000.00, and the necessary consequences thereof is that the fund to be divided among the unsecured creditors, would be lessened to that extent, and the appellant would gain therefore, a larger proportion of the assets than other creditors.

(c) The transfer by the bankrupt of said sum of $13,000.00 to appellant was with intent to prefer appellant over other creditors. The intent is always deducible from the payment of a large portion of their property by bankrupts while insolvent. The rule is laid down in *Toof v. Martin,* 13 Wall. 40, 20 Law Ed. 481, and has been followed in many cases subsequent to that time.

The intent to make a preference is presumed from payments within the four months period by a bankrupt with knowledge of his insolvency.

Eastern Drug Company v. Hanover Beiringer Drug Company, 8 Fed. (2nd) 838, 7 A. B. R. (N. S.) 163.

transfer is prima facie with intent to prefer on the part of the bankrupt unless he can show he was at the time ignorant of his financial condition.

Toof v. Martin, 20 Law Ed. 481; 13 Wall. 40.

The insolvency of the debtor will be presumed to have existed as of the earliest date alleged in the petition where he or the intervening creditor fails to sustain the burden of proving his solvency after the shifting of the burden.

In Re Donnelly, 27 A. B. R. 504; 193 Fed. 755;
In Re Perlhefter and Shatz, 25 A. B. R. 576; 177 Fed. 299.

A bankrupt is charged with the knowledge of his own insolvency when he has the information in his own possession from which he can ascertain the fact that he was insolvent.

Morimura v. Tabeck, 279 U. S. 24.

This intent to prefer appears from the fact that the sum of $13,000.00 was not paid in the usual course of business, but a special check was procured in order that the same might not show in the bank account of the bankrupts.

(d) The transfer of $13,000.00 to appellant was made within the four months period. It was paid on June 9th or 10th, 1929, and the creditors' petition in bankruptcy was filed August 17, 1929. The above shows the affirmative evidence necessary to sustain the Master's findings as to Nos. 5 and 16, and all of the above is practically conceded by the appellant, and it seeks to avoid the effect thereof by setting up an alleged assignment as of the date of March 5, 1929, a date prior to the beginning of the four months period. In this matter the burden is upon the appellant to establish the assignment and the evidence thereof is insufficient to do so.

The evidence shows that there was no assignment in fact, in that the bankrupt retained control of the fund and received a voucher in payment thereof. (T. R. 600, 601, 602). The testimony to show the execution of the alleged assignment is unreliable in that the bankrupts have been shown to be unworthy of belief, and the execution of the instrument, including the delivery of the same rests upon the testimony of Dee Francis alone, who answered "yes" to four leading questions of the appellant (Appellant's Brief, page 14); for the instrument is not by its terms an assignment but is a power of attorney to make a draft upon the Lincoln Mortgage Company. Such an instrument, if made, is not sufficient under the statutes of Arizona to constitute an assignment unless the same is accepted in writing.

Revised Code of Arizona, 1928, Sections 2429 and 2433.

Verbal acceptance of a bill of exchange requiring the drawee to pay a specified sum, but not from any particular fund, does not operate as an equitable assignment. A verbal acceptance imposes no liability on the drawee.

Erickson v. Inman Poulson & Co., 54 Pac. 949 (Oregon).

No action can be maintained on an order for the payment of money drawn on a third person and revoked by the drawer before acceptance.

Harlan v. Gladding McBean & Co., 93 Pac. 400 (Calif.).

A draft to become an assignment must be accepted in writing by the drawee under the Arizona Statute.

Revised Code of Arizona, 1928, Sections 2429-2433. Secret assignments are void.

Benedict v. Ratner, 69 Law Ed. 991, at page 997;

See also:

Smedley, et al. v. Speckman, 19 A. B. R. 695; 157 Fed. 815;

Christmas v. Russell, 14 Wall 69, 20 Law Ed. 762;

Dillon v. Barnard, 22 Law Ed. 673, at p. 677.

It was stipulated before the Master (T. R. 240) as to all the jurisdictional facts.

ISSUE No. IV

As the Findings of Fact Nos. 5 and 16 cover all the elements required to make a preferential transfer, we do not deem it necessary to make any brief of argument thereon. All other facts that might be necessary to sustain the Master's Conclusion of Law No. 4 are shown in the other findings of fact set up in his report.

ARGUMENT

Appellant in his Brief argues Assignments of Error I and II together. Assignment of Error No. II relates to the Conclusion of Law No. IV in the Special Master's Report; therefore we think it would be more logical to argue Assignments of Error No. I and III together, as they are issues of fact and relate to Findings of Fact only in relation to the Findings of the Special Master approved by the Judge, that the payment of the $13,000.00 to the Appellant was an act of Bankruptcy. The three Assignments of Error run so close together that the argument necessarily overlaps.

While the payment of the money is admitted by the Appellant, it denies that the proof is sufficient to establish the other elements of preferential transfer; therefore as to these elements we are giving considerable attention in this argument especially to the question of insolvency.

ASSIGNMENTS OF ERROR Nos. I and III.

(*Issue No. III*)

(a) *Insolvency at the time of transfer*:

Under this title in our Brief of Argument, we have briefly stated the facts which show insolvency from the beginning of the bankrupts' business up to the date of the filing of the petition in bankruptcy. We supplement that with the following:

Insolvency is shown as of the date of August 17, 1929, by bankrupt's schedules (T. R. 134, 135) disclosing:

An excess of liabilities over assets of	$27,061.26
To which should be added items called "unliquidated claims", which are liabilities and not assets	35,658.79
Making excess of liabilities over assets on August 17, 1929, as shown by bankrupt's schedules of	$62,720.03

Insolvency is shown as of the date of Aug. 17, 1929, by the statement prepared from bankrupt's books and records by Jerry Lee, certified public accountant showing, (T. R. 196):

Excess of liabilities over assets of $43,716.06
The difference being attributable to liabilities, information as to which was not accessible to the accountant at the time that he prepared his statement.

Insolvency is also shown as of the date of July 20, 1929, at the time the statement prepared by Messrs. Nihel and Fryberger, and an officer of the Bank, which statement shows (T. R. 223):

Excess of liabilities over assets of $20,436.25

Insolvency is also shown by the statement of June 20th, 1929, which was submitted to the bank by Mr. Fretz, who afterwards discovered that in this statement he had by mistake omitted the amounts necessary to complete the jobs. (T. R. 361). The statement itself is shown in Transcript of Record at page 234, and would show the bankrupts to have been solvent at that date if taken by itself, but when the amounts necessary to complete the job are taken into consideration, the same as testified to by Mr. Fretz, the statement as corrected would show the bankrupts insolvent, and with the corrections their liabilities must have exceeded their assets by more than $13,226.21, and probably by a sum in excess of $20,000.00.

The bankrupts are also shown to be insolvent by the audit of the Southwest Audit Company (T. R. 197) as of the date of April 30, 1929, and at that date their liabilities exceeded their assets by $30,165.82.

Without going into detail we present in this argument figures showing that when the preliminary expenses of opening business were paid, bankrupts' liabilities exceeded their assets on:

October 10, 1927;
October 15, 1927 (T. R. 83, 84);

April 2, 1928 (T. R. 86, 87, 88);
May 31, 1928 (T. R. 89, 90, 91);
April 30, 1929;
June 20, 1929;
July 22, 1929 and
August 17, 1929.

The first assignment of error (T. R. 629) charges that the court erred in overruling the objection of the Standard Sanitary Manufacturing Co. to that portion of the Special Master's report contained in subdivision 16 of the Master's Findings of Fact, which was to the effect that on or about June 10, 1929, and within four months next preceding the filing of the petition herein, the bankrupts, while insolvent, transferred and made over to the Appellant a creditor, a portion of their property, to-wit, money in the amount of $13,000.00 with intent to prefer said creditor over their other creditors, and Appellant urges that "said finding of fact has no foundation in the evidence submitted because it appears affirmatively in the report of the evidence and by respondents' Exhibit C in evidence that Phoenix Plumbing and Heating Company did, on the 5th day of March, 1929, assign and set over to Standard Sanitary Manufacturing Company all its right, title and interest to the money owing to the Phoenix Plumbing & Heating Co. by the Lincoln Mortgage Co. on a certain contract which the Phoenix Plumbing & Heating Co. then had with the Lincoln Mortgage Co., and that assignment contained an order to the Lincoln Mortgage Co. to pay to Standard Sanitary Manufacturing Co. all of the moneys owing or to become due from the Lincoln Mortgage Co. to the Standard Sanitary Manufacturing Co." (T. R. 629, 630).

The Appellant urges that said objection, as overruled, was based on Respondents' Exhibit C in evidence, which is set forth on pages 630, 631 of the Transcript of Record.

As a further reason for sustaining the assignment of error and as a part thereof, Appellant quotes by question and answer about four pages of testimony (See pp. 631-635, inclusive, Transcript of Record), and makes the statement that all of the evidence in the record on this subject is the testimony of Cliff Fryberger, and quotes the same from the statement of evidence before the Master, which is shown on pages 631 to 635 of the Transcript as aforesaid.

At the time the payment was made, C. B. Fryberger was the Manager of the Phoenix Plumbing & Heating Co. (T. R. 438), and in reference to this transaction he testified as follows:

> * * * "The Lincoln Mortgage Company amount, $14,000, was paid by check to the Phoenix Plumbing & Heating Co. (T. R. 442). I went to the Citizens Bank and had two Cashier's checks made, one for $13,000 and one for $1,000, taken to the bank by myself. * * * I took in place thereof (referring to the $14,000 paid by the Lincoln Mortgage Co.) a check for $13,000 to the Standard Sanitary Manufacturing Co., and a check for $1,000 to the Phoenix Plumbing & Heating Co. it went through the books of the Phoenix Plumbing & Heating Co. (T. R. 442) * * *."

This witness was asked the following question: "It was a fact, was it not, that the reason it was handled this way was because that account had been assigned to the Standard Sanitary Manufacturing Co. for some time be-

fore?" The answer was "That was my understanding of it." (T. R. 443).

It appears from the testimony of the witness (T. R. 438) that he was employed by the Phoenix Plumbing & Heating Co. during June and July of 1929 as Manager, and that under a previous arrangement he had been employed during the year 1928 from September to December; so the witness had no knowledge, as appears from the record, of anything that transpired at any time other than during these two periods, and none at all of the time this instrument purports to have been signed.

The check for $14,000 was produced in court by the Lincoln Mortgage Company (See testimony of Dorothy Dorrell, T. R. 599); she was the custodian of certain checks of the Lincoln Mortgage Co.; the check is reproduced on pages 600, 601 of the Transcript, is dated June 8, 1929, and is payable to the order of the Phoenix Plumbing & Heating Co. for $14,000, and is drawn on the Citizens State Bank of Phoenix, Arizona.

On page 601 of the Transcript appears an endorsement on the back of the check, showing what the payment was for and it recites "payment in full for plumbing on following jobs" and then is recited all the different jobs included therein and the amount that was due upon each. Not only was the check not payable to the Appellant, but it was paid and delivered to the Manager of the bankrupt partnership, Mr. Fryberger (T. R. 441) who appears to have had it in his control up to the time of its delivery to the Appellant.

The item appears as a charge to the Standard Sanitary Manufacturing Co. under date of June 11th upon the cash book of the bankrupt, photostatic copy of which

is shown on page 625 of the Transcript of Record, and in the testimony of Mr. Nihel it appears that the Standard Sanitary Manufacturing Co. credited the check for $13,-000 upon July 11th 1929. So far as the record show, the money or the check was in the hands of the bankrupt, and payment to the Standard Sanitary Manufacturing Co. was made direct by the bankrupt.

The fact that the voucher recites that it was given in payment of certain jobs excludes the idea that it was paid upon an assignment. If it were paid on an assignment, the voucher would have such an explanation, and the custody of the instrument would have been in the Lincoln Mortgage Company from the time of its payment, which does not appear to have been the case, from the testimony in this record. It does not appear that they ever saw the alleged assignment, and the only testimony of any notification to them was the testimony of Dee Francis (Appellant's Brief page 12), which neither the Special Master nor the Court believed, and which they would not have been justified in believing, in view of the other false testimony of the witness that appears in the record, unless his testimony were corroborated by other evidence, which it was not.

While Appellant states in his brief, on page 5, that the Manager of the Standard Sanitary Manufacturing Co. accompanied Mr. Fryberger to the Bank, that statement in the brief finds no support in the transcript of record, and the contrary thereof appears in the testimony of Mr. Fryberger (T. R. 442). The exclusive custody of the instrument (the $14,000 check) was in the hands of Mr. Fryberger up to the time that he made the payment to the Appellant. The statement in Appellant's brief that there was acceptance of the alleged assignment

by the Lincoln Mortgage Company finds no support in the record, so far as we can discover; in fact it is directly contradicted by the voucher itself (T. R. 600, 601, 602). If it had been accepted it would have been in the possession of the Lincoln Mortgage Company, and this voucher would have been payable to the Standard Sanitary Manufacturing Co. and would have stated that it was in payment of the assigned account.

There was no credit upon the books of the Appellant of the assignment itself, and it does not purport to be given as security. It is charged on the books of the bankrupt as having been paid on June 11th, and appears (T. R. 625) as a credit on the books of the Appellant as paid to it on July 11th, 1929. (T. R. 594). That counsel for Appellant had been misinformed about this transaction appears clearly (T. R. 14) for in his answer he expressly alleges that the Lincoln Mortgage Company "delivered to this creditor the sum of $13,000", and the questions asked of Mr. Fryberger by counsel show that it was his belief that the moneys, to-wit, the $13,000, had been paid direct to the Appellant by the Lincoln Mortgage Company, and he doubtless never knew the contrary at all until he heard the testimony of Mr. Fryberger in answer to questions asked by him.

A draft, in order to be an assignment of an account, under the statutes of Arizona, must be accepted by the drawee.

Revised Code of Arizona, 1928, Section 2429.

Not only was this instrument not accepted by the Lincoln Mortgage Company, but no draft seems ever to have been made upon them by the Appellant or any other person, although the instrument itself purports to be only

an authority to make a draft on the Lincoln Mortgage Company. This is clear from the terms of the instrument:

> "Gentlemen: You are by this instrument authorized to draw on Lincoln Mortgage Company, of this city, in the amount of $14,196.77"
> (T. R. 236).

This is merely an authorization to the Appellant to make such a draft; that such a draft was never made may be inferred from the circumstances.

Although the Manager of the Appellant corporation, appeared on the stand, nowhere in his testimony does he state that this instrument was delivered to him, or to his company, or that it was ever in his possession, or that he ever received a payment thereon. (T. R. 586 to 599).

The authorization of this instrument is not to draw upon any particular fund of the Lincoln Mortgage Company, but to make a draft payable out of any general funds that may be in the hands of the drawee at the time the draft is presented; therefore it is not an assignment because it does not convey title to any particular fund, which is necessary to constitute an assignment.

This is not changed by the recitation that the same represents money due the bankrupt for work done and material furnished in construction of various houses and store buildings owned by the Lincoln Mortgage Company, clearly implying that the fund might have been derived from other buildings.

Nor is this changed by the following recitation: "This assignment effective this date", for if the instrument above mentioned does not constitute an assignment, a recitation to that effect could not make it so.

To assume that the bankrupts, men whom the record shows to have been of little education and not of wide business experience, would be able to determine the legal effect of an instrument, as to whether or not it was an assignment, when it is a question which has bothered the courts of every state in the Union to construe, and many of the United States courts as well, is to expect too much from people of limited education, especially those none too familiar with the English language.

The indisputable feature of this alleged assignment is the comparison of it with Respondents' Exhibits D and E appearing on pp. 237, 238 and 239 of the Transcript, where the language used is quite a common form of assignment. These two instruments, as well as the testimony of Mr. Nihel, are interesting from another standpoint, as disclosing the probable methods of the Appellant, and its purpose in taking assignments. It will be noted on page 238 of the transcript there appears a purported assignment dated December 5, 1928, the acceptance being dated June 23, 1929, more than six months after the purported assignment was given, and this acceptance was not made until it was known to the larger creditors that the bankrupts were insolvent (T. R. 282). Their evident purpose was to hold these instruments as a kind of club over their customers, but to conceal their existence from the general creditors so that the bankrupts could obtain money on general credit to pay their bills.

Another interesting fact revealed by Mr. Nihel (T. R. 592) was that (in answer to a question relating to a number of assignments dated May, 1929) he had never seen them before, had no knowledge that they were ever given, and knew no reason why they should have been

given; this, taken in connection with the fact of his failure to testify in regard to any delivery of the instrument dated March 5th to him, or any testimony as to having received any payment thereof, or any testimony as to how these matters were handled, strikingly reveals the fact that these instruments were designed, not as assignments as understood under the bankruptcy law and under the rules of equity, but as mere things to be presented in case of the failure of the alleged assignors, and thus to secure preference over other creditors. Such action renders an instrument so taken a nullity. (T. R. 592).

It will be noted in this connection that on May 14, 1929, Dee Francis, who signed this instrument, denied to Mr. McNichol (T. R. 571) that he had given any assignments whatsoever, and according to Mr. McNichol's testimony on several other occasions, in answer to questions by Mr. McNichol, he repeated that he had not and that the firm had not made any assignments whatsoever. This statement that he had made such assignments was made on May 14th when he was applying to the bank for a loan, and he actually received from the bank, on May 15th, a loan of $1,000. It would be taxing credulity to claim that the bank would have loaned him the money if he had told the truth about the so-called assignments, if such they were.

A comparison of these assignments with Exhibits D and E shows that Exhibit C (T. R. 236) has no witnesses to it, while assignments D and E (T. R. 237, 238, 239) are in each instance witnessed by Frank J. Campbell and I. L. Nihel. Apparently the instrument dated March 5th was prepared by someone other than the bankrupts or the Appellant. This is probably the explanation of why Mr.

Nihel gave no testimony in regard to this instrument, and in all probability counsel for Appellant had never been informed of the facts in regard thereto.

The testimony of Frank McNichol in regard to his conversation with Dee Francis on May 14th (T. R. 572) is very striking. He says: "I met Dee Francis as I was coming out of the bank. It was the day before they got the last loan from the bank, and he said he needed $1,000; I said he would have to take it up with Mr. Norris or some other officer of the bank; I asked him if he still had the money coming on the courthouse job and he said yes; I said was any of that assigned, and he said no. I said I would like him to cover them with some kind of security and asked him for an assignment; and when I got back to the bank I found a loan of $1,000 had been made him by another officer of the bank."

On page 571 of the Transcript, Mr. McNichol further testified: "I had requested that he bring in a list of moneys due them and this (referring to Petitioners' Exhibit No. 27) was brought to me in response to my request. After that statement was given to me, I had conversations with D. L. Francis as to whether any of these contracts had been assigned, and Mr. Francis said none of them had been assigned; he repeatedly made these statements to me. Every time he brought in a list I asked him, but he would always say no." (T. R. 571).

It will be noted in Exhibit 27, shown on page 596 of the Transcript that there was then due to the bankrupt partnership the sum of $15,435.92 on 41 cottages now finished.

Mr. McNichol also says that at no time subsequent to the date of that statement did he have any notice or

knowledge that that contract had been assigned. During the month of May, 1929, he had a conversation with D. L. Francis in regard to these assignments. (T. R. 571, 572).

Mr. McNichol is an unimpeached witness, a reputable, reliable and truthful witness; Mr. Francis is what this record shows him to be.

Secret assignments are void in Bankruptcy.

Benedict v. Ratner, 69 Law Ed. 991; 268 U. S. 353-365.

As appears earlier, the $14,000 item never passed through the bank account of the bankrupts. It appears that at that time they were making very few deposits,—the business was on its last legs, and this payment was made on June 9th and paid over to the Appellant on June 11th, and no deposits were made in the bank by the bankrupts between the dates of June 18th and August 17th,—this latter being the date on which the petition in bankruptcy was filed. (T. R. 554).

Leo Francis, who claimed to own the whole business, testified: "I do not know that the Lincoln Mortgage Company accepted the assignment; I don't know that there was a written acceptance. The Standard Sanitary Manufacturing Company gave us credit after they got the money in June. I wasn't present when the money was paid." (T. R. 355).

On June 22, according to the testimony of C. L. Lane (T. R. 282) there were conferences at the Commercial National Bank and Fryberger and Nihel participated in these conferences. The purpose was to ascertain the condition of the company. "Figures on accounts

payable to Standard Sanitary Manufacturing Co. account furnished from Mr. Nihel", but Nihel seemed to have been silent at these conferences in regard to any question of assignments. The conferences were to find out the true condition of the company; Nihel was urging the need for creditors helping the company over its difficulties; he did not say it was a going concern at all these conferences, although he may have said it at one time. Figures were compiled to figure out the exact condition of the firm, but no one was ready to step forward and help them. "I spent a lot of time over it; it was patent that the Phoenix Plumbing & Heating Co. was insolvent. The reason for preparing the statement was that I was directed by bank officials to find out the exact condition of the Phoenix Plumbing & Heating Co. I know they were insolvent definitely on July 20th, but had reason to believe it before. On figures furnished by Mr. Fryberger, insolvency was established. The figures on the statement show them insolvent. Nihel did not say the concern was solvent on July 20th; he said at that time we would be lucky if we got so many cents on the dollar." (T. R. 283).

Again we find that Mr. Nihel makes no reference to the so-called assignments. They were in a conference to obtain funds for the continuation of the business; it was his duty to speak if he expected the bank or other unsecured creditors to furnish the capital to complete the contracts then on hand and out of which he expected to realize the money for the merchandise sold by him.

D. L. Francis testified that he did not give notice to other creditors of the assignments of Lincoln Mortgage Company to the Standard Sanitary Manufacturing Company on March 5th. (T. R. 428).

Appellant does not appear to contend that the payment of the $13,000.00 did not deplete the estate, or that it did not receive a larger proportion of the assets than other creditors of the same class would receive. It could hardly do so in view of the schedules filed by the bankrupt, Leo Francis, from which it appears that the appellant has received more than twice as much money as all the other unsecured creditors together would have received, if the full amount of the scheduled assets should be converted into cash.

Appellant seems to contend that no intent is shown in the evidence. As to that we submit that intent can seldom be proven by direct evidence, and any direct evidence by the bankrupt of his intent would not be entitled to much consideration in Court, in view of the falsity of the bankrupt's testimony upon material matters in this case as shown by the evidence in the Transcript of Record referred to in our Statement of Facts and our Argument under that head in this brief, and from the payment of the money while the bankrupt was insolvent, the intent is necessarily implied. The rule is laid down in *Toof v. Martin,* 20 Law Ed. 481; 13 Wall 40, and this, with other cases cited in our Brief of Argument, are sufficient, we think, upon this point. No attempt was made to overcome the presumption arising from the evidence of the payment of this large sum of money by the bankrupts at a time when the record shows that they were insolvent.

That the payment was made within the four months' time is a mere matter of examination of the records. The money was paid either June 9th or 10th, 1929, and the creditors' petition was filed on August 17, 1929.

Falsity of Bankrupts' Testimony.

As the findings of the Master confirmed by the Judge are founded on conflicting testimony and as in the view of Appellees, Appellant's case depends entirely on the testimony of bankrupts we deem it important to place before this Court the character of the bankrupts and what the record discloses as to their truth and veracity.

It will be noted that the testimony in regard to the payment of the $14,000 by the bankrupts, through Mr. Fryberger, direct to the Phoenix Plumbing & Heating Company and the elements of the preference are proven by witnesses whose testimony is clear and unimpeached, and their character clearly appears as being that of persons interested only in telling the truth. We propose now to contrast that with the testimony on which Appellant's case against the petitioning creditors rests.

It will be noted that all of the elements necessary to prove a preference are thus established by testimony other than that of the bankrupts themselves, although the various admissions by the bankrupts, made reluctantly and many times wrested from them by a rigid examination, confirm the truth of the statement of disinterested witnesses.

We now propose to show that the Special Master and the Judge of the District Court could not do otherwise than reject the testimony of the bankrupts except in so far as it consisted of admissions against interest, or as to such matter as was corroborated by other testimony of reputable witnesses, or by documentary evidence.

The issue of partnership was one that was hotly contested by the bankrupts, and each of them in the hearing before the Special Master denied same; and, although their answer has not been made a part of this record, the evidence of the falseness of their testimony on that issue (it being a material issue), is such a contradiction of both documentary evidence and testimony of unimpeachable witnesses that it was considered false by the Special Master and by the District Judge, and could not have been otherwise, under the facts as here shown.

Leo Francis testified:

"D. L. Francis bought it for me before I came; I was the sole owner" (T. R. 336) this being in reference to the business known as the Phoenix Plumbing & Heating Company which is referred to on that page of the record.

In answer to question of his counsel, he stated "I am sole owner of Phoenix Plumbing & Heating Company." (T. R. 343).

"I never told him that the three brothers were partners." (T. R. 343).

"I had other liens; they were not on file as partnership liens; there were two or three of partnership." (T. R. 344).

"Gehres found that affidavit of partnership was necessary to support them, after the Bachowitz liens were filed." (T. R. 343, 344).

In testifying as to the $1100, Leo stated: "Father loaned it to me,—not all three boys. It did not show on books of the Phoenix Plumbing & Heating Company that I owed him $1100 when I started business. It was in

family so I didn't show it in accounts payable on statements we made." (T. R. 352).

"The insurance men knew there was no partnership. Nothing was said between me and school district representatives about partnership, or bonding company. It was so understood the first bond we signed. (T. R. 357). I never told the bank we were partners; I told them I owned the business." (T. R. 358).

"I knew I was signing articles of partnership, but didn't know I was running into all this stuff. * * * they waited until time to file lien was almost over; it was done to make the lien good. Had no thought of creditors; only desire to save $2,000 on lien for concern. Mr. Gehres told me to do that." (T. R. 359).

A few moments later he testifies: "Gehres did not get information as to partnership from me; he was working there a few months before that time * * *." T. R. 359).

That the above testimony of Leo Francis was false and that he knew it was false is clearly shown on page 73 of the transcript of record, Exhibit No. 1, which is a plumbing contract entered into on the 5th day of September, 1928, by and between Leo Francis, D. L. Francis, and Lyon Francis, a partnership doing business under the firm name of Phoenix Plumbing & Heating Company. The contract is signed by the Phoenix Plumbing & Heating Company and the signatures of each of the three brothers is attached thereto as members. This contract is shown on page 80 of the transcript. It was produced by Mrs. Louise Gage Dennett, Clerk of the Board of Education, and custodian of the contract. (T. R. 355).

That the above quoted testimony of Leo Francis is false is further shown by the bond accompanying said contract which is set up in the transcript of evidence at pages 80 to 84, inclusive, of the record, and which is signed by Phoenix Plumbing & Heating Company a partnership, and the three brothers as members, the signatures appearing on page 82 of the transcript of record.

The falseness of this testimony is further shown by petitioners' Exhibit No. 4 (T. R. 89) which was a statement to R. G. Dun & Company, showing that the three brothers were partners and so represented to be on August 18, 1928, and from this statement it also appears that a similar statement was made May 31, 1928, signed by the Phoenix Plumbing & Heating Company by Paul E. Gehres. (T. R. 90).

In a further statement to R. G. Dun & Company, petitioners' Exhibit 26 (T. R. 198) the full names and ages of the three brothers are given. This statement was signed on August 14, 1928, by Phoenix Plumbing & Heating Company by Paul E. Gehres, Cashier, in which it is stated that all items of the statement relate to June 1st, 1928.

The testimony of Leo Francis is also shown to be false by the testimony of Floyd M. Stahl, attorney at law, who testifies as follows:

"I was present at a conversation held in Mr. Norris' room at the Adams Hotel the latter part of July at which Leo Francis, Mr. Norris, Mr. Lane and Mr. Fretz were present, and Leo Francis said at that time that the Phoenix Plumbing & Heating Company was a partnership run by the three brothers on a profit-sharing basis. * * * to the best of my recollection, Leo denied that it was his

business alone; he said it was the business of all of them." (T. R. 430, 431).

Leo Francis' testimony is further contradicted by the testimony of Walter S. Wilson, Clerk of the Superior Court of Maricopa County, who produced the records in cause No. 28535, wherein, in a sworn complaint, the Phoenix Plumbing & Heating Company is designated as a copartnership consisting of Leo Francis, D. L. Francis and Lyon Francis (T. R. 266, 267). Such falseness is also shown by the certificate of copartnership, executed by all three of the brothers on the 27th day of December, 1928, acknowledged before a Notary Public and filed in the office of the County Recorder of Maricopa County, Arizona, on December 28, 1928, in Book 2 of Partnership Records, at page 144 thereof. (T. R. 251). And this was found as a fact in the findings of fact of the Special Master (T. R. 22). That neither the Special Master nor the Judge of the District Court believed the bankrupts upon the issue of partnership also appears clear from the findings numbered 9, 10 and 11, on page 22 of the Transcript of Record, wherein it is found that each of them owned an interest in the Phoenix Plumbing & Heating Company and participated in each of the acts of bankruptcy herein mentioned.

That the testimony of bankrupts Leo Francis and Dee Francis is unworthy of belief by the Special Master or the Judge also clearly appears from the following evidence in the record:

The testimony of Leo Francis is further shown to be false by the testimony of C. L. Lane, of the Commercial National Bank, in Phoenix, that in July, 1929, at a conference in the Adams Hotel at which were present

Leo Francis, Mr. Norris, President of the Bank, Mr. Stahl, and Mr. Fretz, Leo Francis stated that the business was a partnership and that he and his two brothers shared the profits. (T. R. 278).

The bankrupt, Dee Francis gave false testimony in regard to the partnership as follows:

"I bought the business for him (referring to Leo Francis) I put it 'D. L.' so it would be Leo's initials and cover both names as a joint name. Leo's name isn't "D. Leo.'" (T. R. 635).

Dee Francis opposed the adjudication upon the ground that he was not a partner, and in the hearing before the Special Master and before the Judge he was represented by O. E. Phlegar, as counsel.

Upon the issue of partnership Dee Francis was contradicted by the testimony of Mr. Frank McNichol, Cashier of the Commercial National Bank, who stated that he had had a conversation with Dee Francis about the middle of October, 1928; that he called him in there to get acquainted with the business, and the first thing he asked him was whether the business was a corporation, and Dee Francis said it was not; that it was a partnership composed of the three brothers; that he handled the financial work and the estimating and that the other two members were practical plumbers, and supervised construction.

This witness further testified:

"I distinctly remember when he first came in, in October, and established the fact that he and his two brothers were the Phoenix Plumbing & Heating Company, and that was later confirmed by Dun and Bradstreet reports." (T. R. 566, 567).

Witness further identified Exhibit No. 18 for identification and testified that it was the statement handed to him by Dee Francis for the purpose of trying to influence him to give them further loans; it was handed to him soon after February 15, 1929, and is Petitioners' Exhibit No. 27 in evidence. (T. R. 203).

The testimony of Dee Francis was further shown to be false by the various bonds which he signed, along with his brothers, showing partnership transactions, by the certificate of partnership heretofore referred to, in the complaint in the Bachowitz case, to which he made verification, and by other portions of his testimony not here referred to.

That Lyon Francis was a partner is also shown by his signature to the various bonds and other instruments referred to above.

Knowledge of Insolvency.

Knowledge of insolvency may be clearly imputed to each of the bankrupts at various stages of their partnership. From the statement of facts heretofore set up in this brief, it is clear that the business was started on a shoe-string, and that they never acquired any money through profits on any single contract. That this company could have continued for twenty-three months and they be deceived as to its condition is impossible. Their subsequent conduct showed that they acted with knowledge of insolvency, particularly their conduct between the dates of January 1, 1929, and the time of the incendiary fire on April 21, 1929. That the two brothers, Leo and Dee Francis, were drawing money out of the firm

at a rate that not even a solvent concern could stand, is clear from the testimony, and is only explainable upon the theory that it was done knowing that the institution was soon to be bankrupt. They drew, during this period of almost four months, very large amounts, for no reason given, and then the records covering this period, especially the cash book, was destroyed in an incendiary fire. Dee Francis was present about 9:00 or 9:30 the night the fire started, and he left Gehres there, according to his testimony. The fire was started with a slow fuse, and to burn down and then set fire to the building, according to the testimony of Mr. Green and Mr. Asche, police officers, this must have been arranged at about the hour Dee Francis admits he was on the premises. (T. R. 384). Strangely, too, the safe door had been left open and the cash book that contained the records of the payments during this critical period was the one book that was practically totally destroyed. That Leo Francis was cognizant of the situation appears from his testimony at various places. He paid the last of the $700 due his father two months prior to the date of the bankruptcy. (T. R. 353). He drew $400 for himself—not for business purposes but for some unexplained reason—about the 1st of January, 1929. (T. R. 357). He permitted his brother to check out large sums of money for unexplained purposes, and certainly not for business purposes, the sum of $2100 being paid during March and April alone to one Thomas,—why it does not appear. (T. R. 388). Dee paid $1100 to Carom (T. R. 387) and no record can be found to justify that payment. At that time he appears to have bought $1400 in stock of the Arizona Garment Company for himself, and the money was paid out of the funds of the bankrupts. (T. R. 388).

Dee Francis admits he knew how much they owed creditors, the larger ones, not the smaller ones. (T. R. 396). He drew $3250 a year and expenses; he did not know what was coming to him on January 1, 1929, whether $100, $500 or $1,000. (T. R. 396).

When it is considered that at this time they were endeavoring to get additional moneys for their payrolls from the Commercial National Bank, without any security; that they were not paying anything to the general creditors; that further credit had been refused to them during this period by various concerns, there is only one explanation to be made as to the withdrawals of these large sums of money and the convenient fire that followed, and that was to drain the business of every cent they could get their hands on, and of all money they could borrow from the bank. That an explosion occurred and put out the fire and prevented the total destruction of their records, was something they had not counted on.

Testimony on Which Appellant Relies to Establish Alleged Assignment on March 5th, 1929.

The testimony of Leo Francis upon which Appellant relies to establish its defense is set up in Appellant's brief at page 12, and is given by question and answer.

Leo Francis is asked if it was not a fact that he gave the Standard Sanitary Mfg. Company an order on the Lincoln Mortgage Co. for all the money due March 5th, and he answered "Dee gave them". Q. Did you know about it? A. Yes, I had heard them talk of it. Q. It was agreeable to you that that should be given? A. Yes. Q. It was on March 5th? A. I could not say; it was in 1928."

From the above it is evident that the witness knew nothing of the transaction; that he had never seen the instrument and had only heard something about it, from whom does not appear. He was shown Exhibit "C" for identification and asked if he ever saw that before, and he answered by saying "I wouldn't say that I have seen it, but I talked with Mr. Bower about it. I knew he had it."

We have heretofore shown that this evidence was not believed by the Special Master or by the United States District Judge, and in view of what is disclosed as to his lack of truth and veracity, by the evidence heretofore set out, how could they have believed him?

Mr. Bower was not called to the stand, nor is it shown that he was not available. The witness Leo Francis was plainly led along by counsel for Appellant, to whose cause he was very friendly and whom he doubtless liked personally, and was asked the question: "The Lincoln Mortgage Company accepted it?" and the answer was "Yes". Afterwards in his testimony it was disclosed that he did not know whether they accepted it or not. (T. R. 355).

His testimony, however, is interesting on another point, and on this point he is corroborated by testimony that is unquestionably true. In answer to question by counsel for Appellant he said "They gave us credit when they collected that $13,000."

He testified to many legal conclusions, showing that he was a "yes man". In about two pages of testimony quoted by counsel for Appellant in their brief (pages 12 to 14 incl.) there are twelve "yes" answers. We assume that the testimony of a witness so gently led along, and

the character of the witness as shown by other testimony in this transcript, are not sufficient to overthrow the findings of fact made by the Special Master and by the Judge of the District Court.

The bankrupt, Dee Francis, is also a good "yes man." Questions are asked of this witness, as shown in brief of Appellant, at page 14, and each of these questions is answered "Yes." We submit, too, that the testimony of this particular witness, which has been contradicted by documentary evidence and by the testimony of reputable witnesses upon other material issues in this case that were important issues in the trial below, is not worthy of belief and should not have been considered by the Master or the Judge, as it evidently was not, as shown by the finding of fact upon that question.

We call the court's attention to the fact that the testimony contained in these four questions and answers of "yes" are the only testimony in the record to indicate that the instrument dated March 5, 1929, ever passed into the possession of the Standard Sanitary Mfg. Company, and is the only testimony as to its being delivered, if ever delivered.

It will be noticed from the testimony of Mr. Nihel (T. R. 586 to 599) that this particular document was not produced by him, as were the other so-called assignments in his possession, nor was it produced by the Lincoln Mortgage Company in whose possession it would have been if it had been a valid assignment. Nor was any draft produced or testified to as having been drawn in accordance with the instructions in the instrument itself. Apparently it never was in the possession of the Standard Sanitary Mfg. Company or the manager thereof would not have allowed it to be introduced at the hearing,

on the testimony of a discredited bankrupt witness. We give Mr. Nihel credit for not being willing to perjure himself in order to establish his contention in this matter. He was the one person who could testify as to these facts and he would not otherwise have left the establishment of so vital a proposition as this to the unreliable and very doubtful testimony of one of the bankrupts in whom he had no confidence and whom he believed was a rogue and a thief, if we are to believe the testimony of Leo Francis given on page 337 of the transcript of record in which he says that Nihel advised him to get rid of Dee and of Gehres because their payrolls were too large, and other discrepancies referred to.

We submit that the testimony of this witness is utterly worthless, and that this court would have reversed any finding based upon it.

The only reputable witness upon whose testimony they relied is that of Mr. Fryberger, and evidently counsel had been misled as to the truth of the facts or he would never have asked the questions he did of Mr. Fryberger that he did ask. Counsel asked this question, on page 11 of his brief:

Q. "Isn't it a fact that the way that was handled was that a check was made to the Phoenix Plumbing & Heating Company for $14,000?"

A. Yes, sir.

Q. The check was endorsed over by the Plumbing Company to the Standard Sanitary Mfg. Company?

A. No, sir. I went to the Citizens Bank and had two Cashier's checks made, one for $13,000 and one for $1,000.

Q. Taken to the bank by yourself?

A. Yes.

Q. And you took in place thereof a check for $13,000 to the Standard Sanitary Mfg. Company and a check for $1,000 to the Phoenix Plumbing & Heating Company?

A. Yes."

It will be seen from the above that counsel had assumed that the original check had been received by the Phoenix Plumbing & Heating Company and endorsed directly over to the Appellant, and evidently the first time he learned the contrary was when he heard the answer of Mr. Fryberger. The only testimony that he gives that would tend to show that these contracts (not book accounts) were ever assigned to the Standard Sanitary Mfg. Company was the question and answer on page 12 of their brief:

Q. "And the Lincoln Mortgage account was assigned to the Standard Sanitary in March?

A. So I understand."

We submit that this is not competent evidence and has no probative value. It is an answer we give when we do not know the facts but have heard statements in regard thereto. There is no evidence that Mr. Fryberger ever saw the instrument in question; he was not an employe of the company at that time, nor for three months afterward.

Assignments.

Mr. C. L. Lane of the Commercial National Bank, testifies:

"After that statement was given to me, I had conversations with Dee Francis as to whether any of these contracts had been assigned, and Mr. Francis said that no contracts had been assigned; he repeatedly made that statement to me. Every time he brought a list in I would ask him if there had been any assigned but he would always say no." (T. R. 571).

Dee Francis testified:

"I had no conversations with representatives of the bank regarding assignments of any jobs we were working on; they did not ask me to assign any contract. I told Mr. McNichol that there were no assignments on the city hall job; I said we had money coming in, but I don't think I specified the City Hall job." (T. R. 409).

"I did not give notice to other creditors of the assignment of the Lincoln Mortgage Company to the Standard Sanitary Mfg. Company on March 5th."

(Testimony of Dee Francis, T. R. 428).

Counsel for appellant states in his brief at page 32, that there is no clear indication of insolvency up to the very day of adjudication, and then attempts to explain away the findings of the certified public accountant, Mr. Jerry Lee, and the financial statement prepared by him as of August 17th, showing excess of liabilities over assets of over $43,716.06 (T. R. 196) and the financial statement of April 30, 1929 (T. R. 197) prepared by the same accountant showing a deficit on the latter date of $30,165.82.

Counsel for appellant dismisses the financial statement prepared by the creditors as of July 20, 1929 (T. R. 223) with the statement that it shows "some indica-

tion of insolvency as of that date". The indication referred to is that it shows an excess of liabilities over assets of $20,436.25 (T. R. 223). He ignores entirely the statement of June 22nd as corrected by the testimony of Mr. Fretz, the bookkeeper who prepared same, who called attention to the fact that in making this statement he had failed to include therein the probable cost of materials and labor necessary to finish the work on the outstanding contracts. The contracts he had listed as having a value of $47,400.64. There were figures to indicate that at least $18,945.00 would be required to complete the work. This would leave them insolvent as of that date in the sum of $13,226.21. As a matter of fact the liabilities were much greater and the $47,400.64 was a mythical asset as was demonstrated later when $25,-065.07 of that amount was taken over by the various bonding companies for the completion of the work. (See T. R. 25, under title "Unliquidated Claims"). And up to the time of the hearing, the receiver in bankruptcy of this estate had not been able to collect anything upon any of these contracts, and it is fair to assume that they all proved liabilities.

Much of the matter set up on pages 33 and 34 in appellant's brief does not find any support in the record. There are no references to the parts of the transcript of record where the alleged evidence can be found. Therefore it is difficult to point out the inaccuracies. This much is true. The financial statement of April 30, 1929, was prepared by the Southwest Audit Company, and Mr. Lee of that company was retained by the petitioning creditors not to make a complete audit of the Phoenix Plumbing & Heating Company's book after the petition in voluntary bankruptcy had been filed, as is the inference that

might be drawn from the language used in appellant's brief on page 33, but to prepare a true statement of the assets and liabilities of the bankrupts as of the dates of April 30, 1929, and August 17, 1929. The result of his work is set up on pages 196 and 197 of the Transcript of Record. The purpose of Mr. Lee's being retained by the bonding companies to audit the books of the Phoenix Plumbing & Heating Company does not appear in the record to be as set out in appellant's brief, but his employment at that time was to ascertain the condition of the particular jobs in which the bonding companies were interested, as well as what could be ascertained by the records accessible to him and outside information that might be obtained. This was a very different proposition from that of preparing a statement of the assets and liabilities of the bankrupt as the same appeared upon the records of the bankrupt copartnership. We do not recall that there is anything in the record about his securing the figures upon which the bonding companies were able to make satisfactory settlements with the materialmen involved. We think the inference is to the contrary for it would appear that no settlements had been completed at the time of the filing of the schedules in bankruptcy by Leo Francis (T. R. 125, 126, 127) and nowhere in the testimony are we able to find that such settlements were made. If they had been, we presume that the receiver in bankruptcy would have done his duty and have collected such sums as might have been due the bankrupt therefrom.

So it is apparent that Mr. Lee was correct in declining to list as assets the $25,065.07 shown in bankrupt's schedules not to be assets, although listed as unliquidated claims. It was also proper for him to refuse to list the

$3,700.00 Bachowitz claim as that was a total loss (T. R. 344, 151, 159), long prior to that time. So it is demonstrated by these various statements that the appellant in his brief is mistaken when he asserts that "there is no clear indication of insolvency up to the very date of the adjudication."

We submit that the testimony of the expert accountant, together with the figures compiled, show during this period from April 30th to August 17th that the liabilities of the bankrupt exceeded the assets of the bankrupt by a sum in excess of $30,000.00. In our Statement of Facts (See pages 6-21 of this brief) we have compiled the figures that show that this bankrupt started business with a capital of either $800.00 or $1,000.00; that within ten days of the Remsbottom purchase, this was all dissipated in preliminary expenses and the purchase of the so-called good will, which appears to have been of no value whatsoever unless it enabled the bankrupts to obtain a credit they would not otherwise have received. The testimony also shows that so far as their records disclose, they never made a profit on a single contract that was entered into. There is a striking bit of testimony given in this regard by Leo Francis when he says that after Mr. Fryberger became the manager they did not get any more large contracts; that he bid upon them and his bids were too high. This, we think, explains what happened in this case. Mr. Fryberger was an experienced man and his bids must have been such as would have allowed a reasonable profit. The bankrupts,—at least two of them—were very young and inexperienced, and the other had a record of a failure in business and insolvency that terminated in an assignment of his property and book accounts to the Crane Company just two months before the starting of the

Phoenix Plumbing & Heating Company. It was an inauspicious beginning and any business man with knowledge of the facts could easily have foretold the bankruptcy which was only postponed through the taking of contracts at figures that while they must have eventually landed the firm in bankruptcy, gave the appearance of success and furnished a basis for obtaining credit which was bolstered up by financial statements that were undoubtedly false.

Appellant in its argument, page 17 of its brief, contends that the instrument, "Exhibit C" (T. R. 236) is not only an assignment, but an order to the Lincoln Mortgage Company for the sum of $14,196.77. In this it is mistaken. The instrument is addressed to the Standard Manufacturing Company, and the language of it is:

> "You are by this instrument authorized to draw on Lincoln Mortgage Company, of this city, in amount of $14,196.77."

There is no testimony in the record that such a draft was ever made, much less accepted, and according to the laws of Arizona, Revised Code of Arizona, 1928, Sections 2429 and 2433 such an instrument does not constitute an assignment unless accepted in writing by the drawee. And although appellant's brief, page 18, claims that the Phoenix Plumbing & Heating Company had no jurisdiction whatsoever over this money and had no right to draw on the same or demand any portion thereof from the Lincoln Mortgage Company, the record contradicts this assertion. In the first place the Lincoln Mortgage Company never paid the amount of $14,196.77, nor was this amount ever credited by the appellant on the account of the bankrupts. (T. R. 442). Then the Lincoln Mortgage Company exercised its control over the fund in

question by drawing its voucher check payable to the Phoenix Plumbing & Heating Company and delivering the same to Mr. Fryberger, the manager thereof (T. R. 442) deducting therefrom $196.77 (T. R. 602). The bankrupt then through Mr. Fryberger exercised dominion over the fund in question through Mr. Fryberger by taking the check into its possession, cashing the same, purchasing a draft for $1,000, (T. R. 442). Bankrupts further exercised dominion over the fund in question by allowing to the Lincoln Mortgage Company a discount upon the account of $196.77 (T. R. 602). It further exercised dominion over the sum in question by having a check drawn to the appellant for $13,000.00 and charging same upon its cash book to the appellant, forwarding the check to the appellant and the same was acknowledged by credit upon the books of the appellant to bankrupt for the sum of $13,000.00, no previous credit having been given for the fund alleged to have been assigned; and it will be borne in mind that the instrument itself does not represent that it was given as security for the payment of any debt, nor does the instrument itself in terms preclude the bankrupt from making a draft for any amounts upon the Lincoln Mortgage Company.

Further on in this argument we will show that under the authorities the writing does not constitute an assignment of the fund.

On page 18 of appellant's brief, counsel makes this statement:

> "The Court will know that the testimony of Leo Francis who claimed to be the proprietor of the business, and who, according to all the evidence was clearly one of the partners, was to the effect that the

Lincoln Mortgage Company accepted this assignment on the 5th day of March (Statement of Evidence, page 335). This evidence of acceptance on the part of the Lincoln Mortgage Company was not repudiated by evidence produced by the petitioning creditors."

What appellant fails to state in its brief, is that Leo Francis himself repudiated his evidence. (See T. R. 355).

On the same page of its brief, page 18, appellant contends that the assignment was for a definite, liquidated amount in the hands of the Lincoln Mortgage Company and a specific fund, and that the full title and right was transferred by the bankrupt to the appellant on the 5th day of March.

Far from being a specific fund the instrument is drawn upon the Lincoln Mortgage Company generally and does not set out to be drawn upon any particular fund in their hands, nor is there anything in the evidence to indicate that they held any specific fund to which the same might have been directed. We are not contending that there may not be an assignment of book accounts if properly made; nor that there might not be a specific assignment of a contract or contracts, and in case the claim is that it is an assignment of a contract, to make a valid assignment, the contract itself should be delivered to the assignee in order to make it valid and possibly this assignment should be in writing in order to convey the title.

On pages 18 and 19 of its brief, appellant asks that, what he calls the fundamental test of the bankruptcy law, be applied to the transactions and asks could the bankrupt exercise any right, control or claim upon the $14,-

000.00 "assigned" in Respondent's Exhibit C, or could any representative successor or assignee of the bankrupt make any claim or exercise any right over the said fund after the "execution" of said "assignment."

The answer to that is that the bankrupt did exercise control over this fund and that at no time did the appellant ever exercise any control over this fund, as shown by the record above cited, and up to this date the appellant has never obtained control over the fund in question and received only $13,000.00 of the amount which it now claims its own and the testimony excludes any idea that the money was paid to Mr. Fryberger as an agent of the appellant.

We must again call the attention of the Court to the error into which counsel for the appellant has been drawn and of his failure to carefully examine the Transcript of Record, for he speaks of the check being "delivered to these two men, who thereupon went to the bank upon which the check was drawn and deposited the same, and by mutual agreement two cashier's checks were drawn." There is nothing in the record to even hint at the transaction being in such form. It is directly contradicted by Mr. Fryberger, the man who handled the checks, the man who procured the check voucher from the Lincoln Mortgage Company, and his testimony positively states that the facts as asserted in appellant's brief did not occur. (T. R. 442).

On the same page of its brief, page 19, appellant says: "As it appears in the testimony, the Standard Manufacturing Company permitted this disposition of the money so as to save the Phoenix Plumbing & Heating Company its payroll." This too finds no support in the record. As shown above Mr. Fryberger for the bank-

rupt cashed the checks and so far as this record shows, applied the money as he saw fit.

We agree with the law as quoted by appellant on page 20 of its brief and as laid down by the Supreme Court of the United States in the case therein cited, but the trouble is that the facts of the present case do not bring the instrument in question within the rule there laid down. In the first place the Master's finding of fact excludes the idea that the instrument was ever delivered to the appellant or that appellant ever exercised any control over the fund in question. The Court will recall that the only testimony as to the execution and delivery of the instrument was the testimony of D. L. Francis in the four "yes" answers to the leading questions quoted by appellant on page 14 of its brief; and that the testimony of this witness was unworthy of belief, is shown in many places in the record, and that appellant's counsel did not consider him worthy of belief, may well be inferred from the question he uses in his brief on page 18, where he says, that according to all the evidence Leo Francis was one of the partners. This witness, Dee Francis, had testified strongly that there was no partnership and that Leo was the sole owner. That counsel for appellant was right in his statement in his brief that the evidence clearly showed that there was a partnership, is clearly demonstrated in this record, and that Dee Francis testified falsely in that matter is demonstrated in the record.

Counsel for appellant further claims in his brief on page 20, that the instrument was an order upon and an assignment of all the money in a specified fund of a definite party, which said order was accepted by the party holding the fund. We again call to the Court's attention that it is a statement in the brief not supported by the record.

The instrument itself does not purport to be an order upon any person or any fund. It is an authority to make a draft, and the instrument would not constitute an assignment until accepted by the drawee, this being the law of Arizona (Revised Code of Arizona, 1928, Sections 2429 and 2433) and the only testimony as to the acceptance of the instrument is the testimony of this same Dee Francis whom counsel for appellant has inferentially said was unworthy of belief.

Counsel for appellant briefly refers on page 22 of his brief, to the question of insolvency and states that he will discuss it more fully under the third assignment of error, however, stating at the same time that there was no real evidence of insolvency at any time prior to the 20th day of July. We will ~~too~~ to leave the discussion of that question to the argument upon that branch of the case, merely stating here that counsel has ignored all the testimony of insolvency contained in the record in regard thereto, and has apparently forgotten that upon the failure of the bankrupts to appear with books and records showing their assets and liabilities, the burden of proof fell upon them to establish insolvency and that though some creditors were fooled by false financial statements designed for the purpose of obtaining credit, that is no evidence of solvency of the bankrupt who signed and published the false statements.

On page 22, counsel for appellant anticipated the "assignment" was a secret one and in "defraud" of creditors and calls the court's attention to the fact that the allegation of petitioning creditors in the proceedings is not that the transfer was made with intent to hinder and defraud or delay creditors. It is true that the allegation is merely that of a preferential transfer, but the rule of law

forbidding secret "assignments" is equally applicable to preferential transfers.

Nor is the allegation against the bankrupt that he committed an act of bankrutcy by the assignment of this $13,000.00 item to the appellant, but is that the payment of the money to appellant was under the circumstances a preferential transfer (T. R. 8). The alleged assignment is set up by the intervening creditor, appellant, is in the nature of a confession and avoidance, and the burden of proof is upon him to establish that the assignment was complete and for a present consideration; that he took notorious and exclusive possession of the fund and that the payment was actually made upon the assignment. All this is matter of defense against the allegation of the creditor's petition.

Answering appellant's contention that there is no evidence of intent to prefer this creditor over other creditors, it is sufficient answer to that, that intent is a matter of deduction from the acts of a party and not susceptible ordinarily of direct proof, and every person is presumed to intend the natural consequences of his acts.

On page 23 counsel for appellant contends that the Phoenix Plumbing & Heating Company had "potential assets" in excess of the amount of its liabilities. The trouble is that these potential assets consisted of hopes and expectations which developed into liabilities long prior to the filing of the petition in bankruptcy. Indeed, the differences between counsel for appellant and the certified public accountant who prepared the statement showing the insolvency of the bankrupts at the various periods prior to the filing of the petition in bankruptcy, seems to grow out of the fact that the accountant refused to recog-

nize these "potential assets" as being anything but liabilities. That they were liabilities is demonstrated by the testimony showing that they had to be taken over by the bonding companies responsible for their completion, and, of course, all expenses in connection therewith had to be deducted from these "potential assets". If these assets were not liabilities, there would be no reason for the requiring of a bond of the contractor.

Counsel says on page 23: "All of these jobs were bonded and these were ample security at that time for all of its debts". If this were true there would be no petitioning creditors to bring a proceeding in bankruptcy. Counsel has evidently mistaken the purpose and effect of the bonds given.

We approve heartily of the rule laid down in Gage Lumber Company v. McEldowney, 207 Fed. 255, quoted on page 24 of appellant's brief. The trouble though is that the facts are entirely different in that case, as may be seen from part of the opinion quoted by appellant. That was an assignment given for the purpose of securing money to purchase lumber or timber before the same was sawed, the lumber having been purchased by assignee to be delivered to him when sawed and was intended to apply on his contract. The difference in the two cases is that the alleged assignment in the case at bar was for a pre-existing debt and at the time that the alleged assignment was given, the work upon the Lincoln Mortgage Company property was completed, according to the statement furnished the bank, which statement is set up on pages 203, 204 and 205 of the Transcript of Record, and contains this description:

> "Lincoln Mortgage Company. Balance due on 41 cottages now finished $15,435.92."

(T. R. 204). So that the alleged assignment never induced the appellant to furnish any material for the construction of these buildings and none was delivered upon the faith thereof. As to the credit extended by the appellant to the Phoenix Plumbing & Heating Company thereafter, it may well be assumed that that credit was extended upon the faith that they had placed in the bonding companies, rather than any confidence in the bankrupts. This appears from the many alleged assignments they took, even of these bonded jobs.

Nor do we see that the quotation from Chief Justice White's opinion given on page 25 of appellant's brief, helps the case of the opinion. That opinion merely holds that where a check was given with "the understanding and agreement of the parties that an advance *about to be made* (Italics ours) should be a charge on and be satisfied out of a specified fund, a court of equity will lend its aid to *carry such agreement into effect as against the drawer of the check,* mere volunteers, *and parties charged with notice.*" (Italics ours.)

The difference between the two cases will be noted. In the case referred to in Mr. Justice White's opinion, there was an advance about to be made,—It became a charge upon a specified fund. Here there was no advance made,—the alleged assignment being to secure, upon the theory of the appellant, an advance, already made, the work already having been done, nor was the authority contained in Exhibit C to make a draft a setting apart in any form of any specified fund. It was a mere power given to make a draft. So far as the record shows, this power was never exercised.

Appellant states in its brief on page 26 that the Standard Sanitary Manufacturing Company had express

notice, the Lincoln Mortgage Company accepted the assignment, and the Phoenix Plumbing & Heating Company made it. There is no testimony that the Standard Sanitary Manufacturing Company had express notice, other than the "yes" answers of Dee Francis which the Master and the District Judge refused to believe. That the Lincoln Mortgage Company accepted the assignment does not appear anywhere in the record, nor does the appellant point out where it can be found. On the contrary all the facts and circumstances indicate that the Lincoln Mortgage Company did not accept the assignment, or anything else in connection with the transaction. This is shown by the fact that the voucher check of the Lincoln Mortgage Company was made direct to the Phoenix Plumbing & Heating Company and was not for the amount of the alleged assignment. (T. R. 600). It recites that it was in payment of certain "jobs" and the payment was made to Mr. Fryberger, the manager of the Phoenix Plumbing & Heating Company. (T. R. 601, 602). No clearer evidence, we submit, could be produced to negative the assertion in appellant's brief.

On page 25 of appellant's brief, the Court's attention is called to the fact that there is no provision in the State laws of Arizona by which assignments of the nature of the instrument introduced in evidence in this case are required to be recorded. That is true. But the statutes of Arizona, Revised Code of 1928, Sections 2429 and 2433 do require that an instrument such as is authorized to be drawn by the Standard Sanitary Manufacturing Company in Exhibit C (if same was ever executed) is required to be accepted in writing before the same becomes an assignment of the fund.

Counsel for appellant is in error when he states in his brief, page 30, that Mr. Lee of the Southwest Audit Company was retained by the petitioning creditors to make an audit of the Phoenix Plumbing & Heating Company's books after the petition in involuntary bankruptcy was filed.

Mr. Lee was employed to compile a statement for petitioning creditors of what the records of the bankrupt showed as to the financial condition of the bankrupts on April 30, 1929, and August 17, 1929. The two financial statements appear in the Transcript of Record at pages 196 to 198 inclusive. The work for the petitioning creditors was done about December, 1929 (T. R. 532). There is a statement by the appellant on page 33 of its brief as to the purpose for which Mr. Lee was retained by the bonding companies, and in it counsel says the purpose was to audit the books of the Phoenix Plumbing & Heating Company. Our understanding of the matter is that Mr. Lee was retained only to ascertain the status of the particular jobs upon which the Phoenix Plumbing & Heating Company had been working, and on which these bonding companies were liable, and that he was authorized by the bonding companies to make an investigation outside of the records of the Phoenix Plumbing & Heating Company and such information obtained outside, would, of course, only be hearsay, so far as this court was concerned and could not affect the accuracy of any statement drawn from the records of the bankrupts. This seems to invoke the ire of appellant's counsel, and he charges bad faith against the accountant because he does not put this hearsay in his testimony. The striking thing, however, about it is that the figures given by the accountant are verified by the schedules filed by the

bankrupt, Leo Francis for himself and the Phoenix Plumbing & Heating Company.

On page 35 of its brief, appellant refers to the incendiary fire that took place on April 21, 1929, and which so conveniently disposed of the cash book containing the record of the payments from December, 1928, until April 21, 1929, and criticizes the attorney for petitioning creditors for drawing out evidence indicating that one of the bankrupt partners was present at about the time that the fire was started. This evidence was given by Dee Francis (T. R. 384) and is an admission against interest by him. The evidence of Mr. Green and Mr. Asche shows conclusively that the fire was of incendiary origin (T. R. 284 to 288, incl.). Other evidence in the record discloses the motive and opportunity for the commission of the offense. The court will draw its own conclusions from the evidence in the record.

On page 34 of the brief, appellant says that with this matter, Mr. Lee was able to obtain a very accurate and clear statement of the amount due on the various jobs. The amount of money paid the Phoenix Plumbing & Heating Company and upon his figures, the bonding companies were able to make satisfactory settlement with the materialmen involved. We have been unable to find in the Transcript of Record the basis for this allegation. Mr. Lee testified that he was not present when the settlement with the materialmen was made. From the testimony of Mr. Thalheimer, the Receiver (T. R. 250) and from the schedules filed by Leo Francis (T. R. 99), it would appear that no settlements had ever been made between the bonding companies and the bankrupts or the receiver in bankruptcy up to the time of the hearing before the Master. Consequently this record does not show

whether the bonding companies were able to complete these jobs without loss to themselves or not, or whether they had claims against the bankrupt for a deficiency.

The statement on page 34 of appellant's brief that Mr. Lee "proceeded to make up statements for the petitioning creditors which would show insolvency," is utterly unwarranted. Mr. Lee is not responsible for the condition of the bankrupts and it was the condition of the bankrupts that required that the statements prepared by him did show insolvency. Appellant seems to be laboring under the delusion that uncompleted contracts on which in the very nature of things, there would have to be a loss, should be counted as assets, the theory apparently being that because it was not known by everybody on April 30, 1929, that bankrupts were insolvent, that an auditor making up a statement from the records several months later, should list as assets these contracts which time had demonstrated to be liabilities. In this connection we again refer to Leo Francis' schedules as showing that no course was left to the auditor other than the one that he pursued.

It is a strange assumption on the part of counsel for appellant that when the bankrupts are demonstrated to be insolvent upon August 17, 1929, and upon July 20th, 1929, that a presumption arises that a loss of assets amounting to approximately $62,720.05 had arisen between these two dates. This in the face of all the testimony to the effect that there had been no substantial change of conditions in the affairs of the bankrupts during these periods of time, and especially in view of the fact that the evidence taken as a whole shows that they were insolvent from October 10, 1927, and had never so far as their record shows, had one profitable contract in all that period.

On pages 35 to 38, inclusive, counsel for appellant attempts to analyze the statement of April 30, 1929, presumably with the purpose of showing that the bankrupts were solvent at that time. There is much in this statement of criticism of Mr. Lee, but nowhere in all these pages is a reference made to the Transcript of Record of supporting facts, or any reference whatsoever other than a mere one to Petitioner's Exhibit No. 25.

On page 39 of its brief, appellant's counsel refers to the testimony of Leo Francis, "that he believed that if he could liquidate and turn into cash his contracts receivable at any time prior to adjudication of bankruptcy, there would have been more assets than liabilities in the Phoenix Plumbing & Heating Company." This belief, had it existed, upon the part of the bankrupt, would not have been evidence of any fact. His unreliability as a witness has been disclosed in this record. His ability to turn into cash contracts erroneously called "contracts receivable" depended upon his business qualifications, his ability to estimate correctly the cost of carrying out the contract, including a proper proportion of the overhead of the business, and the ability to get business. This ability to get business, Leo Francis claims to have had, and his method is indicated in his own testimony in which he says that there were no large contracts after Mr. Fryberger took charge; that Mr. Fryberger put in bids but they were too high. Possibly Mr. Fryberger considered the advisability of making a profit upon the contracts and thus preventing his employers from being placed in bankruptcy.

On pages 40 and 41, appellant makes the statement that a proper statement of the assets and liabilities of the bankrupts on that date, would have shown that they

were solvent on April 30, 1929. If such were the case, why was not evidence introduced to that effect, and why does not appellant explain the loss in assets between that date and August 17, 1929?

The most surprising statement in appellant's brief is that "proof that a man was insolvent on a certain date, is not proof that he was insolvent on a date prior thereto." Appellant ignores the presumptions and inferences that are to be drawn from insolvency proven as of a given time and a failure to explain the disappearance of assets, if the assertion is made that the bankrupt was solvent at a previous time.

Citations on Assignments.

We believe the following citations on the law of assignments will be of assistance to the Court:

See Little v. Holybrooks Company, 13 A. B. R. 422 (5th Circuit 1904). The language of the Court on page 425 is as follows:

> "As to the second act of bankruptcy, that is the preferential transfer of property to a creditor just quoted below, this section fixes the date from which the four months will begin to run in cases involving written transfers required or permitted to be recorded, and when there is no provision for such record, the date of the beginning of the running of the four months is fixed at the time when the beneficiary of the transfer takes notorious, exclusive or continuous possession of the property, unless the petitioning creditors have received actual notice of the transfer * * *."

> "If the registry laws of the state are not applicable to the transfer, the four months limitation will

begin only on implied notice to the creditors arising from change of possession or actual notice to them of the transfers."

and on page 429 the Court says:

"The rule is harsher against the bankrupt than against the creditor. When the bankrupt wishes to avail himself of the four months limitation and the alleged act of bankruptcy is a transfer, four months must have elapsed from the record of the transfer if a record is required or permitted; if not, four months from the notorious possession of the beneficiary."

The case of Johnson v. Huff, Andrews & Moyler Co., 133 Fed. 704 (4th Circuit, Nov. 15, 1904), is a case which bears a strong resemblance to the one now on appeal. The assignment in this case reads as follows:

"Roanoke, Va. January 30th, 1902.
"Treasurer or Paymaster N. & W. Ry. Co., Roanoke, Va.—

Dear Sir: You will please pay to Huff, Andrews & Moyler Co., for value received, any and all moneys that may now be due me, or may hereafter become due me as boarding boss on your line of road.

"(Signed) John A. White.

"Witness: Susie Chafin".

We quote from the statement of facts made by the Court showing the manner in which this was handled, from which it appears that this order was held until immediately prior to bankruptcy when it was presented to the person to whom it was addressed. The court held that the instrument was invalid and was effective as a

transfer only when presented to the railroad, and therefor constituted a preference within Section 60 of the Bankruptcy Act. The case is well considered and is supported by the case of Wilson v. Nelson, 183 U. S., 191-198, 46 Law Ed. 147, which is quoted from, and this case in its turn quotes the case of Mathews v. Hardt, 80 N. Y. Suppl. 462; In re Klingaman (D. C.) 101 Fed. 691.

The Court uses this language:

> "The creditor has jeopardized and forfeited all rights under such order and the fund ordered to be paid over to Huff, Andrews & Moyler Company by the Referee and District Judge, became vested in the Trustee for the benefit of the general creditors."
> See page 707 of the opinion.

In Dillon v. Barnard, 22 Law Ed. 673, the Court says on page 677:

> "The present case, notwithstanding the largeness of the plaintiff's demand, is not different in its essential features from those cases of daily occurrence, where the expectation of a contractor, that funds of his employer derived from specific sources will be devoted to the payment of his service or materials, is disappointed. Such expectation, however reasonable, founded even upon the express promise of the employer that the funds shall be thus devoted, of itself avails nothing in favor of the contractor. Before there can arise any lien on the funds of the employer, there must be, in addition to such express promise, upon which the contractor relies, some act of appropriation on the part of the employer depriving himself of the control of the funds, and conferring upon the contractor the right to have

them applied to his payment when the services are rendered or the materials are furnished. There must be a relinquishment, by the employer, of the right of dominion over the funds, so that without his aid or consent the contractor can enforce their application to his payment when his contract is completed."

In Houchin Sales Co. v. Angert, 11 Fed. (2nd) 115, the court says at page 117:

"There are questions of fact involved in the findings of the special master, as well as some conclusions of law. Such findings of fact, where the evidence is conflicting, and where the trial court approves the same, are entitled to great respect in an appellate court and carry much weight. Unless manifestly erroneous they will not be disturbed."

See Citations; and further the Court says on page 117:

"The Bankruptcy Act (Comp. St. Sec. 9587) designates among acts of bankruptcy the transfer while insolvent of any portion of the debtor's property to one or more of his creditors with intent to prefer such creditors over his other creditors. Mere preference is not sufficient. The intent to prefer is an essential of the act of bankruptcy, and such intent is a question of fact to be proven. Persons are presumed to intend the natural consequences of their acts, and if a substantial part of a debtor's property is conveyed to a creditor there is a strong presumption of an intention to prefer and bestow upon him a preference. * * *. The nature of the business transacted and the facts and circumstances of

each particular case are important to be considered in determining such question."

In Wilson Bros. v. Nelson, 103 U. S. 191, 46 Law Ed. 147, a debtor more than a year prior to the filing of the petition in bankruptcy, gave to a creditor an irrevocable power of attorney to confess judgment upon a promissory note after its maturity. Within four months before the filing of the petition in bankruptcy against the debtor, the creditor obtained such a judgment and caused execution to issue thereon. The debtor having failed to within five days before the sale under execution to discharge the judgment or to file a voluntary petition in bankruptcy, the court held that judgment and execution constituted a preference by the debtor within the meaning of the bankruptcy act. It seems clear from the court's action in the above case that the Supreme Court entertains the view that such contracts are executory in character and become operative only as of the date of their fulfillment. The meat of the decision is found in this postulate:

> "The Act of 1898 makes the result obtained by the creditor and not the specific intent of the debtor the essential fact."

The Court's attention is called to the similarity in the cases. Instead of a power of attorney to enter a judgment, the instrument set up on page 236 of the Transcript of Record, if valid, would constitute a power of attorney from the bankrupt to appellant to make a draft upon the general funds in the hands of the Lincoln Mortgage Company. It was not directed to any of the funds, but was to be paid out of any fund that the Lincoln Mortgage Company might have in its hands belong-

ing to the bankrupt. In the case cited above, Wilson v. Nelson, the power of attorney was exercised. In the case at bar the power of attorney, if ever given, was never exercised, for the evidence does not show that any draft was ever made upon the Lincoln Mortgage Company by the appellant and on the contrary it does appear that the bankrupt retained and subsequently exercised a control over the funds and collected the same.

Appellant's appeal and brief are based upon the theory that the payment of $13,000.00 to the appellant was paid under the "assignment" dated March 5, 1929, for $14,196.77. As the instrument does not prove itself, and the payment does not purport to be a payment under the instrument, the circumstances under which the payment was made and the evidence given when it was produced in court, are most important.

On June 6, 1929: The bankrupts made an assignment to Crane Co. (T. R. 574-575) of book accounts and claims of every nature; amount $4725.00. As originally drawn, this instrument was for $4725.00. Afterwards, two items of $500.00 each were erased (T. R. 575). The explanation made (T. R. 576) was that these two items were subsequently paid.

On June 7, 1929: The appellant released all claims to these items amounting to $4725.00 (T. R. 578). The release is to Crane Co., and contains a recitation that it was done after reviewing the "assignment" (T. R. 578).

On June 8, 1929: Lincoln Mortgage Company issued its check to Phoenix Plumbing Co. for .....14,000.00 (T. R. 600 to 603, inc.).

On June 11, 1929: A charge appears to appellant on books of bankrupt of ....$13,000.00 (T. R. 626).

On ~~June~~ July 11, 1929: This item appears on books of appellant as a credit to bankrupt (T. R. 594) for $13,000.00

The context in the testimony of Mr. Nihel shows that there was no mistake as to date. The two preceding items on July 6th of $11.72, and July 7th, of $200.00, and the next payment after that of the bankrupt shown on books of appellant as of July 26th, amount of $71.22 (T. R. 594).

Why appellant held the cashier's check for $13,000.00 *for one month without crediting on its books does not appear in the evidence anywhere.*

The foregoing clearly indicates that appellant intervenor, and bankrupt, acted in collusion in depriving the bankrupt of $17,725.00 of live assets, leaving nothing for unsecured creditors or for carrying out of building contracts, or carrying on the business.

From the above it will be seen that all of the available assets were transferred by this payment of cash to the appellant, and the transfer of book accounts and contracts to Crane Co., within the period commencing June 6, 1929, and ending June 11, 1929; that the bankrupts or anyone else at all familiar with the affairs of the bankrupt could fail to see that this must result in the failure of the Phoenix Plumbing and Heating Company, and that the estate would be depleted so that these two creditors would receive more than their fair share of the assets

of the corporation; that they took these assignments and payments with the knowledge upon the part of the bankrupts that it would have this effect, and that the intentions of the bankrupts to make a preferential transfer are so clear from this and the preceding evidence that we do not deem further argument upon this necessary.

As we have heretofore pointed out, the only testimony as to the execution of the alleged assignment of March 5, 1929, including the delivery thereof, comes from the lips of one of the bankrupts, whose veracity has been so thoroughly impeached in the testimony upon partnership and assignments by documentary evidence and the testimony of witnesses of standing that we do not believe that the Court would hold that the Master was bound to believe the testimony of this bankrupt (Dee Francis), especially so as it is contradicted by all the circumstances surrounding the payment of the above sum of $13,000.00 to the appellant, and the circumstances surrounding the delivery of the check of the Lincoln Mortgage Company for $14,000.00 to the bankrupt.

Were it conceivable that the Court could find this evidence sufficient to establish the delivery of the instrument to the appellant by the bankrupt, as testified to by Dee Francis in the face of the failure of the manager of the appellant corporation to so testify while he was on the stand, we would still face the fact of the concealment of this transfer and the payment of the money on the 10th day of June, 1929.

When we consider that the bankrupt partnership was borrowing money from the bank with which to pay its payrolls, and that on each application the manager of the partnership denied that any assignments were being made; that upon the list of contracts furnished the bank

at its request to show what funds would be available to pay loans theretofore furnished the bankrupt, and other sums which they were attempting to borrow, and did borrow, and that this instrument, Petitioners' Exhibit No. 27 (T. R. 203 to 205, inc.) indicates a balance due of $90,235.58, and no assignments mentioned therein, although at the time the same was furnished to the bank the appellant herein was in the possession of various alleged assignments, the concealment of these assignments by Dee Francis from Mr. McNichol, the executive officer of the Commercial National Bank, was made at a time when it was his duty to speak, and comes within the rule laid down by Mr. Justice Brandeis in Benedict v. Ratner, 69 Law Ed. 991, and in many other cases in which it is pointed out that secret assignments and the retention of dominion over the funds alleged to be assigned by the bankrupt imputes fraud, and, as said in that case the delivery of a list of accounts was inoperative to perfect a lien, and was an unlawful preference. In the same case the Court says that this reservation does not raise a presumption of fraud; it imputes fraud conclusively because of the reservation of dominion inconsistent with the effective disposition of title and creation of a lien.

The above decision was rendered in a bankruptcy matter arising in the State of New York, but we do not think that the statutes there in any way change the general law upon the subject as applicable in other parts of the United States.

Connecting this concealment on the part of Dee Francis when it was his duty to speak with the fact that the manager of the appellant corporation made no mention thereof in the various conferences at the bank, the purpose of which conferences was to secure funds for

the continuance of the business and the payment of the payrolls, we think that the duty to speak was alike upon the appellant and upon the bankrupt.

The form of the instrument, so different from that of the other "assignments" set up in record, particularly those to the appellant, indicates that a stranger hand was working. If the appellant was the bona fide holder of the instrument, it is inconceivable to us that Mr. Nihel, being upon the stand, and his own attorney being there and conducting the examination, should not of himself testify to its delivery and to the circumstances surrounding its delivery, if any such delivery there were, and that he would produce records from his own office showing the acceptance thereof, and that if it had been accepted by the Lincoln Mortgage Company, or if any drafts had been made upon the Lincoln Mortgage Company in accordance with the terms of the instrument of March 5th, 1929, he would have testified to such facts.

Moreover, it is inconceivable to the attorneys for the appellees that the diligent, capable, and learned attorneys for the appellant should not have produced officers from the Lincoln Mortgage Company to testify as to the acceptance of the instrument by them and the circumstances under which such instrument was made, and if any drafts were made in accordance with its terms, that they would not have, by proper process brought these instruments into Court.

It is also inconceivable to us that he would not have cross-examined Dorothy Dorrell, who produced the voucher check of the Lincoln Mortgage Company to the bankrupt for $14,000.00, and testified in regard thereto upon the stand (T. R. 599). She testified that she was

the custodian of certain papers and canceled checks of the Lincoln Mortgage Company; that she was employed by it, doing special bookkeeping, and that she had this check in her possession and produced it in court. Certainly, if it had been in payment of an accepted assignment, or of any assignment, the capable counsel of the appellant would have, on cross-examination of this young lady, elicited that fact, and have had her to bring such assignments into court, and certainly, if there were not reason for the concealment of the payment of $13,000.00 to the appellant on or about June 10, 1929, the check of the Citizens State Bank would not have been held by appellant without an entry upon their books until July 11, 1929, one month after its receipt.

These facts are not consistent with open and fair dealings or with a recognition of the rights of unsecured creditors and of banks that are furnishing the money for payrolls to continue a business that was confessedly bankrupt.

SUMMARY

To sum up the points of this argument, we wish to point out that the evidence clearly shows:

1. That the bankrupts started business about October 5, 1927, with a capital not to exceed $1,000.00, and probably not to exceed $700.00;

2. That within ten days after the purchase of the business of William Remsbottom on October 5, 1927, this original capital had been exhausted in preliminary expenses and the purchase of a good will that was of no value to their future business, and that they were actually insolvent on October 15, 1927;

3. That while so insolvent they, on that date, issued a financial statement to obtain credit, in which they made a claim of a net worth of $4,844.54 (T. R. 83); that this result was obtained by valuing that which they purchased for $3600.00, at $7256.00, and omitting liabilities of at least $1900.00 from said financial statement.

This statement, if true, would have shown a net profit of nearly 400 per cent in ten days' time.

4. That after their insolvency had been increased by a further loss of $3700.00 (T. R. 344) they, on April 2, 1928, at a time when their liabilities exceeded their assets in a sum of not less than $4000.00, issued a statement (T. R. 86, 87, 88) in which they showed a net worth of $12,127.80; that if this statement had been correct, it would have shown a gain of 1100 per cent on the original capital invested in six months time.

5. That these figures were arrived at by adding the value of salable merchandise on hand and listing as assets building contracts in the sum of $19,012.10 (T. R. 86), regardless of whether work had been commenced thereon or whether any materials or labor had been furnished therefor, or of whether or not the contracts were taken at a profit or a loss.

6. That on May 31, 1928, while still insolvent, they prepared a purported statement of assets and liabilities (T. R. 89, 90, 91), which, on August 18, 1928, was furnished to R. G. Dun and Co., as a basis for credit, this statement showing a net worth of $15,236.55, or a profit of more than $3000.00, or 300 per cent on the original capital in a period of 59 days.

The result shown in this statement was obtained in the usual manner, by suppressing liabilities and listing

as assets contracts which in no sense of the term could be called assets; that upon the false statement they were able to procure a good credit rating from R. G. Dun and Co. (G-3), and thus incur large liabilities (T. R. 91).

7. That on April 30, 1929, the report of a certified public accountant shows that their liabilities exceeded their assets by $30,165.82 (T. R. 197-198), and that the report of this same certified public accountant shows that this excess of liabilities over assets had increased at the date of the filing of the petitioning creditors' petition to $43,716.06 (T. R. 196); that the accuracy of this statement is shown by the schedules of the bankrupt filed herein (T. R. 290 to 334, inc.);

8. That intervening statements made up by creditors, including the Commercial National Bank, showed the insolvency of the bankrupts;

9. That the bankrupt firm was drained of a large proportion of its assets between the dates, January 1, 1929, and April 21, 1929, and that between these dates important books of the bankrupt firm disappeared, including a cash book covering that period, and that on April 21, 1929, an incendiary fire took place upon the premises, and from that time on many records have been inaccessible, and that Dee Francis was on the premises between nine and nine-thirty on the night of the fire, according to his own statement, and the testimony of the police officers shows that the fire occurred a little later that night, after the candle attached to the fuse had burned down;

10. That for approximately sixty days prior to the appointment of a Receiver in bankruptcy, no deposits were made in the bank by the bankrupt firm;

11. That the bankrupts kept no books from which their financial transactions and condition could be ascertained;

12. That subsequent to the incendiary fire on April 21st, other large sums were disbursed by the bankrupt and no satisfactory accounting therefor was made, and the same do not appear to have been used for the payment of debts of the bankrupt;

13. That if the alleged assignment of March 5, 1929, was ever executed, the fact of its execution was suppressed, and actively concealed from one of the creditors, the Commercial National Bank, and that by virtue of said concealment, loans of money were obtained from the bank, all this occurring in the spring of 1929;

14. That no notice was given to any creditors of the bankrupt of the alleged assignment of moneys due on the various contracts of the bankrupt;

15. That the bankrupts knew of their insolvency, and knew that the payment of the said $13,000.00, together with the transfers made to Crane Co. between the dates June 5th and June 11th, of 1929, would result in a preference in the depletion of the estate, and in these creditors obtaining a larger percentage of the assets of the bankrupt than would other creditors of the same class, and that, knowing this, they made these transfers with the intent to prefer the Crane Co. and the Standard Sanitary Manufacturing Company;

16. That there is no testimony worthy of belief that the said instrument dated March 5, 1928, was ever executed (or delivered) or that the same was ever accepted by the Lincoln Mortgage Company, or that the bankrupt ever relinquished any control over the fund due it from the

Lincoln Mortgage Company, and that, on the contrary, no payment was made under said instrument, but was made direct to the bankrupts by the Lincoln Mortgage Company, and that after the receipt, the bankrupts exercised dominion over the fund.

17. That all the parties to these transfers knew that the effect of these payments on the dates between June 5th and June 11th, inclusive, would be to deprive the bankrupt of all of its available capital, leaving nothing for the general creditors, work a preferential transfer, and force the closing of the business, unless money could be obtained from the bank to provide for payrolls;

18. That the various instruments purported to be assignments theretofore concealed from the creditors by bankrupt were brought to light and precipitated the filing of the petition in bankruptcy, when Mr. Fred Blair Townsend was employed to procure an assignment for the benefit of creditors, and conferences were held with Messrs. Nihel, Duffy, Armstrong, and Townsend (T. R. 612).

IN CONCLUSION

We submit that the decree of the District Court rendered in this matter should be affirmed, and the adjudication in bankruptcy confirmed; that the report of the Special Master upon which it is founded, contains ample findings of facts to sustain the Master's conclusions of law, and that all of these findings of facts were sustained by competent evidence;

That only upon one question is there any conflict in the testimony upon any material issue, and that is as

to the execution and delivery of the instrument dated March 5, 1929, and which purports to be an assignment of contracts or debts due the bankrupt, and that the testimony given by this witness conflicts with all the facts and circumstances of the case; that the records demonstrate that he is unworthy of belief, and that all of his evidence is contained in the four "yes" answers, in answer to leading questions of counsel for appellant.

The appellant concedes that the adjudication of bankruptcy should stand.

We submit that the order appealed from is not an appealable order under Section 25 of the Bankruptcy Act, and that no appeal has been allowed by the Circuit Court of Appeals under the provisions of Section 24 of the Bankruptcy Act, even if such an order were appealable thereunder.

Respectfully submitted,

Thomas W. Nealon,
Attorney for Appellee, William L. Hart, Trustee in Bankruptcy.

Alice M. Birdsall,
Attorney for Appellees, Petitioning Creditors.

APPENDIX

Arizona statutes on Bills and Acceptance thereof as assignments.

Revised Code of Arizona, 1928:

"*Section* 2429. *Bill not an assignment of funds; acceptance necessary.* A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same."

"*Section* 2433. *Acceptance; how made.* The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money."

No. 6416

IN THE

United States Circuit Court of Appeals For the Ninth Circuit

STANDARD SANITARY MANUFACTURING COMPANY, a Corporation,

vs. Appellant,

MOMSEN-DUNNEGAN-RYAN COMPANY, a Corporation, PRATT-GILBERT HARDWARE COMPANY, a Corporation, UNION OIL COMPANY OF ARIZONA, a Corporation, PHOENIX PLUMBING & HEATING COMPANY, a Copartnership composed of LEO FRANCIS, LYON FRANCIS and D. L. FRANCIS, Copartners, LEO FRANCIS, LYON FRANCIS and D. L. FRANCIS, as Individuals, WILLIAM L. HART, as Trustee in Bankruptcy of the PHOENIX PLUMBING AND HEATING COMPANY, a Copartnership composed of LEO FRANCIS, LYON FRANCIS and D. L. FRANCIS, Copartners, Bankrupts, and CRANE COMPANY, a Corporation,

Appellees.

MOTION FOR REHEARING

FRANK J. DUFFY,
THOS. ARMSTRONG, JR.,
R. WM. KRAMER,
WALTER ROCHE,
ROBERT H. ARMSTRONG,
J. E. MORRISON,
Attorneys for Standard Sanitary Manufacturing Company.

TOPICAL INDEX

CASES CITED

No. 6416

IN THE

United States Circuit Court of Appeals For the Ninth Circuit

STANDARD SANITARY MANUFACTURING COMPANY, a Corporation,

Appellant,

vs.

MOMSEN-DUNNEGAN-RYAN COMPANY, a Corporation, PRATT-GILBERT HARDWARE COMPANY, a Corporation, UNION OIL COMPANY OF ARIZONA, a Corporation, PHOENIX PLUMBING & HEATING COMPANY, a Copartnership composed of LEO FRANCIS, LYON FRANCIS and D. L. FRANCIS, Copartners, LEO FRANCIS, LYON FRANCIS and D. L. FRANCIS, as Individuals, WILLIAM L. HART, as Trustee in Bankruptcy of the PHOENIX PLUMBING AND HEATING COMPANY, a Copartnership composed of LEO FRANCIS, LYON FRANCIS and D. L. FRANCIS, Copartners, Bankrupts, and CRANE COMPANY, a Corporation,

Appellees.

MOTION FOR REHEARING

Comes now the Standard Sanitary Manufacturing Company, appellant in the above entitled cause, and moves the Court for a rehearing on the decision rendered by this Court on the twenty-ninth day of July, 1931, in which decision it was held by this Court that the appeal

must be dismissed because it did not come within the purview of Section 25 of the Bankruptcy Act as amended, no application having been made to this Court for a review.

PROPOSITIONS.

This motion for rehearing is based upon the following propositions:

1. That under the Third Assignment of Error filed in this case, and a part of the original record before this Honorable Court, together with the supplemental brief of appellant filed on the twenty-eighth day of May, 1931, in this Court in answer to the motion to dismiss, coupled with the verbal statement made in the opening argument by counsel for appellant to the effect that this appeal was argued upon the proposition that the question of insolvency prior to July 20, 1929, not being proven, the order for adjudication in bankruptcy based thereon was void.

2. That in the argument it was expressly stated by counsel for appellant that the statements in the opening brief confining the appeal to the Lincoln Mortgage Company and raising no question as to the validity of the finding of bankruptcy of the Special Master and the Court as of August 27, 1929, were repudiated, and the complete reliance upon the Third Assignment of Error and the question of insolvency therein raised, entitled this appellant to a review of the merits; as to whether there was sufficient evidence to warrant the findings of fact and conclusions of law of the Special Master and

confirmed by the District Court of the United States, and upon which the adjudication in bankruptcy of August 27, 1929, was based, and with that question the second and most important question upon all the facts in the record is: Was the Phoenix Plumbing & Heating Company, as a matter of law, insolvent on the twentieth day of July, 1929.

ARGUMENT.

Under the provisions of Section 24 (B) of the Bankruptcy Act, as amended, any appeal from a proceeding in bankruptcy, as distinguished from a controversy in bankruptcy, must be allowed by the Circuit Court of Appeals, except as to three specific causes enumerated in Section 25, otherwise a right of appeal through the District Court's allowance of the same is provided. The three acts in a bankruptcy case which are appealable under Section 25 are: (1) An adjudication or refusal to adjudicate in bankruptcy; (2) the allowance or rejection of a claim in excess of $500.00, and (3) the granting or refusal to grant a discharge in bankruptcy.

Obviously, any proceeding in bankruptcy which involves matters between the trustee and creditors, or the bankrupt, is a proceeding under the adjudicated cases reviewable only under Section 24 (B).

In this case it is our contention that the appeal perfected herein in accordance with the provisions of Section 25 was proper for the reason that said appeal was

based upon and could only result in the confirmation or rejection of the decree of the District Court adjudicating the Phoenix Plumbing & Heating Company a bankrupt.

This motion for rehearing is based upon our conviction that this Honorable Court has overlooked the third Assignment of Error and the propositions advanced in the supplemental brief of appellant in answer to the motion to dismiss filed in this Court on the twenty-eighth day of May, 1931, and we respectfully call the Court's attention to the following facts appearing in this case: In all bankruptcy cases inaugurated by an involuntary petition, a motion to dismiss the petition, or the raising of an issue by the bankrupt or a creditor as to the allegations in the involuntary petition, are all preliminary steps which must of necessity result in one of two decisions by the District Court. The District Court must decide whether or not the alleged bankrupt should be adjudicated in bankruptcy, and enter a decree to that effect. The adjudication or refusal to adjudicate is the first decisive step in bankruptcy and cannot be construed as a proceeding in bankruptcy, as it is expressly excepted from the designation of a proceeding in bankruptcy by the provisions of Section 25 which reserves the right to appeal in equity cases for an adjudication or a refusal to adjudicate in bankruptcy. The only pleadings that can be filed in a bankruptcy case prior to the adjudication or refusal to adjudicate are: (1) The petition; (2) a motion to dismiss; (3) an answer on the part of the bankrupt or creditors controverting the allegations of the involuntary petition. No final action can result in the Federal Court

on any or all of the above except in an adjudication or refusal to adjudicate. The first final order that could under any phase of Federal pleading be subject to appeal is therefore the adjudication.

Therefore, proceedings in bankruptcy which are subject to the provisions of Section 24 (B) cannot come into existence in the Federal Court until after the adjudication.

We submit, therefore, that if this motion to dismiss is to be tested by this Court, it can only be tested upon what the result would be if upon the merits the Court should find that the whole proceedings were irregular and that insolvency was not proven until the twentieth day of July, 1929. Every act of bankruptcy alleged in the involuntary petition, and every act of bankruptcy brought to light in the Master's Report, which was confirmed by the Judge of the District Court, took place not later than the sixth day of June, 1929.

Every allegation in the involuntary petition was based upon the following:

> "That the act complained of was committed *while insolvent,* and with intent to prefer one creditor over the other."

Hence, if upon examination of the record in this case the Court should find that no insolvency was proven until the twentieth of July, 1929, there could be no adjudication, and this Court would have to decide that the

Phoenix Plumbing & Heating Company was wrongfully adjudicated a bankrupt by the District Court, or that the evidence submitted made the Phoenix Plumbing & Heating Company in law a bankrupt on the seventeenth day of August, 1929.

Referring to the statement of counsel for appellant in its brief, we wish to call the Court's attention to the following language on page 5 thereof, lines 10 to 19:

> "Counsel for appellant stands by the statement in its brief which is quoted in full on page 5 of appellees' motion to dismiss, in which appellant stated 'that it confines its appeal to the findings of fact and conclusions of law covering the so-called Lincoln Mortgage Company transaction and the question of *insolvency prior to the 20th day of July,* 1929,' and we contend that the question of insolvency raised in the appeal here opens the whole record of the Court, and that upon all the facts in the record there is an issue on appeal which this court has jurisdiction to decide under the provisions of Section 25."

We contend, therefore, that the above quotation raises squarely before this Court the question of insolvency as of July 20, 1929, and that the raising of that question brings squarely before the Court whether or not upon all of the record the decision of the District Court adjudicating the Phoenix Plumbing & Heating Company a bankrupt as of August 17, 1929, was error, and we contend further that this issue having been raised by the appeal, the appellant herein is entitled to have the case considered on its merits as it is rightfully within the

jurisdiction of this Court under the provisions of Section 25.

BRIEF.

There is a wide divergence of opinion among the various Circuit Courts of Appeal on the proper construction of Section 24 (B) and Section 25 in the line of the amendments to the Bankruptcy Act of 1926, and the amendments of the Federal Practice Act in January, 1928. On January 31, 1928, Congress passed an amendment to Title 28, of the United States Statutes, which are contained in Paragraph 861 A and B, and which is supplementary to the Act of February 13, 1925, now embodied in Paragraph 861, Title 28, U. S. C.

A conclusion that this amendment of January 31, 1928, supersedes the amendment of 1926 to the Bankruptcy Act is apparently growing in the various Circuit Courts of Appeal. The Fourth Circuit followed the above amendments in a bankruptcy case in 1928 in deciding the case of *Columbia Gas & Electric Company vs. State of South Carolina,* 27 Federal (2nd) 52, affirming 25 Federal (2nd) 329. The facts in that case were briefly as follows: The appeal from the District Court was for the adjudication of bankruptcy of the Columbia Gas & Electric Company, and a stay of mandamus proceedings against it in the Supreme Court of South Carolina inaugurated by the State of South Carolina. In the case reported in 25 Federal (2nd) 329, the District Court Judge called the petitioner's attention to what is known as Section 861 A and B of the United States Code, and

in accordance with his interpretation thereof the petitioner filed an appeal, as provided in Section 25 of the Bankruptcy Act. The Circuit Court of Appeals in 27 Federal (2nd) 52, held that this was good and adopted the view of the District Court Judge in regard to the effect of an appeal perfected under either mode holding that the appeal was good because of the amendments of 1928. This is a complete change from the decision of the United States Supreme Court in the case of *Harold Taylor, Trustee, vs. Voss,* 70 L. Ed. 889, 271 U. S. 176, and to our minds rightly so for the reason that at the time the United States Supreme Court decided the *Taylor, Trustee*, case, the amendment to Title 28 had not been passed.

The amendment of 1926 to the Bankruptcy Act and the amendment of 1928 to the Federal Judiciary Act was the result of a wide-spread demand in the United States for a simplification of the very complicated methods of appeal to the Circuit Court of Appeals and the Supreme Court of the United States in effect prior to that time, and it appears to us that the Circuit Court of the Fourth District in deciding the case of *Columbia Gas & Electric Co. vs. State of South Carolina, supra,* had in mind the intent behind these amendments, viz., the desire of Congress and the Courts to simplify the methods of appeal then in effect. But admitting for the sake of argument herein that this Court is governed solely by the provisions of Section 24 (B) and Section 25, as amended by the Act of 1926, in this case the decisions as to which section governs decrees and final judgments

in bankruptcy are to the effect that where the final decision of the District Court grants or denies an adjudication in bankruptcy, an appeal under Section 25 perfected in the District Court will lie, and gives this Court full jurisdiction to examine the case on its merits. See also:

Ringling Trust & Savings Bank, et al., vs. Whittfield Estates, 32 Federal (2nd) 92.

We respectfully submit two lines of cases, first on the proposition that the result of this appeal on its merits brings the case clearly within the provisions of Section 25, and, second, that it could not under any theory be appealable under the provisions of Section 24.

The case of *Slattery vs. Dillon*, 17 Federal (2nd) 347, held that the action of the Referee in Bankruptcy in ordering the attorney for the bankrupt to return certain moneys into Court received by the attorney during the four months prior to bankruptcy, was within the purview of Section 25 because it was in the nature of an adjudication for or against a claim in excess of $500.00, though a motion was made to dismiss upon the ground that it could be appealed only upon a petition to revise for the reason that it was a proceeding in bankruptcy. In that case this Court held that where there was a color of one of the three rights created under Section 25, an appeal under that section would lie. It is our contention that in the instant case we have more than a color, and that this appeal on the merits must result in a confirmation or reversal of an adjudication in bankruptcy just as in the case of *Slattery vs. Dillon, supra.* There it was

decided that "the order amounts to the disallowance of a claim appealable under Section 25-A (3)." Apparently in that case this Court applied the very test we are asking for here, that is to say, what effect would the appeal on its merits have, and held that if the effect of the appeal on the merits was to decide upon the allowance or disallowance of a claim in excess of $500.00, then Section 25 applied and the appeal was well taken. The analogy of this case to the case at bar is obvious. A decision of this case upon the merits would confirm or reverse the adjudication in bankruptcy, hence, the appeal was properly brought and is within the jurisdiction of this Court.

See also:

Pratt vs. Bothe, 130 Federal 670,

quoted with approval by this Court in *Slattery vs. Dillon, supra.*

So, too, in the case of *Chappel vs. Brainerd,* 8 Federal (2nd) 987, this Court held that where the question before the Court was based on a judgment allowing or rejecting a debt or claim of $500.00, or over, a petition to revise would not lie. So generally on the question of the allowance of appeals, see:

Triangle Electric Co. vs. Foutch,
40 Federal (2nd) 353,

which discusses at length the distinction between appeals under Sections 24 and 25.

Burns Bros., et al., vs. Cook Coal Co.,
42 Federal 109.
In re Cooperative League of America,
22 Federal 725.

These cases show the distinction between the two classes of appeals and bear out our contention that the instant case, having to do solely with an adjudication in bankruptcy, comes within the provision of Section 25. The latest case upon the real effect of the amendment of May 27, 1926, to the Bankruptcy Act, showing that it is well settled that that amendment did not do away with appeals under Section 25, is,

Rutherford vs. Elliott, 18 Federal (2nd) 956.

We do not find in any of the cases any decisions whereby an appeal, which upon the merits would have the effect of deciding any one of the three following classes of orders or decrees, have been construed to come within the purview of Section 24 (B): (1) any order or decree, the refusal of which would have the effect of adjudicating or refusing to adjudicate in bankruptcy; (2) the refusal to allow or disallow a claim for $500.00 or over, or, (3) any order or decree discharging or refusing to discharge a bankrupt. On the contrary, in all of the cases on the vexatious questions of appeals and petitions to revise wherever any one of the three above named orders or decrees were involved, it has been expressly

held that Section 25 provides for appeal direct from the District Court without first petitioning this Court, giving to this Court full jurisdiction to consider the appeal on its merits.

We submit, therefore, that this case comes clearly within the provision of Section 25, and request this Honorable Court to examine carefully Assignment of Error No. 3 in the record, together with the statements contained in our supplemental brief and in this petition and to grant a motion for a rehearing.

FRANK J. DUFFY,
THOS. ARMSTRONG, JR.,
R. WM. KRAMER,
WALTER ROCHE,
ROBERT H. ARMSTRONG,
J. E. MORRISON,
Attorneys for Standard Sanitary Manufacturing Company.

CERTIFICATE OF COUNSEL.

UNITED STATES OF AMERICA
DISTRICT OF ARIZONA
County of Coconino
} *ss.*

I, FRANK J. DUFFY, one of the counsel for STANDARD SANITARY MANUFACTURING COMPANY, a corporation, appellant, pursuant to Rule 29, Rules of the United States Circuit Court of Appeals for the Ninth Circuit, DO HEREBY CERTIFY AND DECLARE that I have read the within and foregoing Petition and Motion for Rehearing, and the grounds stated in support thereof, and, in my judgment, said Petition and Motion for Rehearing is well founded and the same is not interposed and filed for the purpose of delay.

DATED at Flagstaff, Arizona, this 19th day of August, A. D. 1931.

Frank J. Duffy

(Frank J. Duffy)

No. 6421

United States
Circuit Court of Appeals
For the Ninth Circuit.

J. C. WALTON,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 6421

United States
Circuit Court of Appeals
For the Ninth Circuit.

J. C. WALTON,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index. Page

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

THOMAS F. McCUE, Esq., 1836 Hunter-Dulin Bldg., San Francisco, Calif.,
Attorney for Plaintiff and Appellant.

A. B. DUNNE, Esq., Insurance Exchange Bldg., San Francisco, Calif.,
Attorney for Defendant and Appellee.

In the Southern Division of the United States District Court, in and for the Northern District of California.

AT LAW—No. 18,791–K.

J. C. WALTON,
Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Defendant.

COMPLAINT.

The plaintiff for his first cause of action against the defendant alleges:

I.

That the jurisdiction of this court attaches for the reason that the action is brought against a common carrier by railroad, engaged in interstate

commerce, and it was so engaged at the time and place of the accident described herein; that this action is brought under the Federal Employers' Liability Act; and the defendant's principal place of business and its offices, and officers are located within the jurisdiction of this court; and that plaintiff is a resident of Alameda County, California, and domiciled therein.

II.

That at all times mentioned herein the defendant is and was a railroad corporation, engaged in the business of a common carrier by railroad and interstate commerce and that at the time and place of the accident described herein, both the plaintiff and the defendant were engaged in interstate commerce; that the defendant is a corporation incorporated and existing under the laws of the State of Kentucky and domiciled in said state. [1*]

III.

That on or about the 25th of March, 1930, at about the hour of 4 o'clock in the afternoon of said day at the town of Colton, California, the plaintiff was regularly employed by the defendant in the capacity of a hostler's helper; that his duties as such hostler's helper required him to fill the tanks on engines with fuel oil; and that on said day at said time and place the plaintiff was on the top of a tender or tank attached to defendant's locomotive engine No. 2604, filling said tank with fuel

*Page-number appearing at the foot of page of original certified Transcript of Record.

oil; and that in order for him to fill said tank it was necessary for him to handle the oil beam for the purpose of supplying said fuel oil; and that while the plaintiff was so engaged said locomotive engine backed automatically without being guided or directed by anyone suddenly and with such violence that plaintiff was struck by the oil beam, thrown violently against the back of the cab and was thereby injured as hereinafter set forth.

IV.

That at the time and place of the injury of the plaintiff, said locomotive engine was run out under the oil beam by the defendant's hostler, for the purpose of supplying fuel oil to said engine, that said hostler's duty required him to be in the cab of the engine occupying the place that is usually occupied by an engineer and that instead of remaining in said cab while said engine was being supplied with the fuel oil, said hostler got down out of the cab and left it without anyone taking care of or being in control of the throttle, or air brakes; that by reason of the negligence and carelessness of the defendant's hostler in the handling and operation of said locomotive engine at said time and on account of his failure to be in a position to control and keep said engine standing stationary, said engine automatically, suddenly and violently ran backwards and injured the plaintiff as [2] hereinafter set forth; that at said time said engine was defective in this: that it had a defective, leaky throttle, the valves and air con-

nections controlling the air for the purpose of setting the brakes were also defective and out of repair and that when the steam accumulated in the steam chest the throttle and valves, and other connections and appurtenances were so out of repair and defective that they failed to hold the steam in its place; that by reason of said defective condition of said engine and the failure of the hostler to remain in a position so that he could control the engine, said engine ran away as hereinbefore set forth; that the negligence and carelessness of the defendant, through its agents and employees was the direct and proximate cause of plaintiff's injuries.

V.

That at the time and place of the accident hereinbefore described the plaintiff was supplying said engine with fuel oil preparing the said engine for the purpose of enabling it to handle interstate commerce in interstate commerce traffic; and that said engine was being fueled preparatory to its use in interstate commerce and that said engine was a regularly assigned engine to handle and transport interstate commerce.

VI.

That at the time and place hereinbefore described, and as the direct and proximate result of the negligence of the defendant, its officers, agents and employees, the plaintiff was injured as follows: A fracture of his seventh and eighth dorsal vertebrae; a fracture and broken end of his left third

lumbar; fractured and broken bones of the front part of his cervical spine; an abnormal condition of the atlas, causing fever and excruciating pain; a tearing and severing of the ligaments in the dorsal and cervical region; internal injuries and bruises in the upper portion [3] of his body; a crushed and broken pelvis; that on account of said injuries the plaintiff was confined in the White Memorial Hospital at Los Angeles from March 26, 1930, until the 14th of April, 1930, that on the 15th day of April, he was transferred to the Southern Pacific Hospital in San Francisco, where he was confined until on or about the 6th day of July, 1930, and for a period of eighty-four days he was compelled to lie on his back in bed and unable to move without assistance. During all of said time he suffered physical and mental, excruciating pain; that he is a married man and has a family and at the time of his injuries he was the age of thirty-two years and an able-bodied, healthy man; and that on account of said injuries he has been wholly incapacitated from earning any thing whatever which has caused him great mental suffering and worry on account of his inability to earn a living to support his family; at said time and prior to his injuries he was earning the sum of five dollars and seven cents (5.07) per day, seven days a week; that he is still confined in a hospital and still suffering pain both physical and mental; that his injuries are permanent.

VII.

That by reason of the facts hereinbefore alleged

the plaintiff was compelled to employ physicians and surgeons and he has already become liable for hospital, nurses, medical attention and doctors' bills, in the sum of two thousand ($2,000.00) dollars; and that two thousand ($2,000.00) dollars is the reasonable and usual charges and costs for said services, no part of which has been paid; that by reason of the facts hereinbefore alleged and the injuries sustained, pain and suffering, the plaintiff has been damaged in the sum of seventy-five thousand ($75,000.00) dollars, no part of which has been paid.

The plaintiff for his second and further cause of action against the defendant alleges:

I.

Plaintiff incorporates and re-alleges Paragraphs I, II, III [4] and IV, the same as though the same had been rewritten and set out in full as therein stated.

II.

That on the 25th day of March, 1930, the plaintiff was regularly employed by the defendant as a hostler's helper and was receiving from the defendant the sum of five dollars and seven cents ($5.07) per day, and was so engaged for seven (7) days of the week; that as a part of the duties as said hostler's helper the plaintiff was required to fill the tanks and domes of the locomotive engines of the defendant with fu*le* oil; that on said day at the town of Colton, California, while the plaintiff was on the top of the dome of the tender

the defendant's engine No. 2604 supplying fuel oil to said engine, the defendant's hostler, whose duty was to remain in the cab and in control of said engine, carelessly and negligently left his post of duty leaving the engine unprotected and that said engine suddenly and violently of its own accord and without anyone guiding, ran backwards, threw the plaintiff violently against the back of the cab of said engine where he was injured as hereinafter set forth.

III.

That at the time and place that plaintiff was injured the defendant through its officers, agents and employees, negligently and carelessly and in violation of the Federal Boiler Inspection Act, and directly contrary to the requirements of section 23, U. S. C. A., Volume 45, page 79, U. S. Statutes, failed to properly inspect said engine No. 2604 and used said engine and permitted it ot be used at said time and place while its throttle, valves and steam chest and other appurtenances thereto were defective, in bad condition and unsafe to be operated in the service for which the same was being employed, in violation and contrary to the statute aforesaid; and that by reason of said engine having not been [5] sufficiently inspected and being unfit for the service for which it was being used and as the direct and proximate result thereof plaintiff was injured as hereinafter set forth.

IV.

That by reason of the facts hereinbefore set

forth and as the direct and proximate result of the failure of the defendant to have said engine, boiler and appurtenances thereto inspected and permitted the same to be used in the service of the business, for which it was intended and used, while it was defective, uninspected and out of repair in the parts and appurtenances hereinbefore described, plaintiff was injured as follows: A fracture of his seventh and eighth dorsal vertebrae; a fracture and broken end of his left third lumbar; fractured and broken bones of the front part of his cervical spine; an abnormal condition of the altas, causing fever and excruciating pain; a tearing and severing of the ligaments in the dorsal and cervical region; internal injuries and bruises in the upper portion of his body; a crushed and broken pelvis; that by reason of said injuries plaintiff was compelled to employ physicians and surgeons and he has already become liable for hospital, nurses, medical attention and doctors' bills, in the sum of two thousand ($2,000.00) dollars; and that two thousand ($2,000.00) dollars is the reasonable and usual charges and costs for said services, no part of which has been paid.

V.

That on account of said injuries the plaintiff was confined in the White Memorial Hospital at Los Angeles from March 26, 1930, until April 14th, 1930; that on the 15th day of April, he was transferred to the Southern Pacific Hospital in San Francisco, where he was confined until on or about

the 6th day of July, 1930, and for a period of eighty-four days he was compelled to lie on his [6] back in bed and unable to move without assistance. During all of said time he suffered physical and mental, excruciating pain; that he is a married man and has a family and at the time of his injuries he was the age of thirty-two years and an able-bodied healthy man; and that on account of said injuries he has been wholly incapacitated from earning anything whatever which has caused him great mental suffering and worry on account of his inability to earn a living to support his family; at said time and prior to his injuries he was earning the sum of five dollars and seven cents ($5.07) per day, seven days a week; that he is still confined in a hospital and still suffering pain both physical and mental; that his injuries are permanent.

VI.

That by reason of the aforesaid facts plaintiff has been damaged as follows: On account of loss of time and salary the sum of six hundred and eighteen dollars and twenty-four cents ($618.24); for doctors' bills, nurses, hospitals, medical attendance, the sum of two thousand ($2,000.00) dollars; and for injuries sustained, pain and suffering, the sum of seventy-five thousand ($75,000.00) dollars, making a total of seventy-seven thousand six hundred and eighteen and 24/100 ($77,618.24) dollars, no part of which has been paid.

WHEREFORE, plaintiff demands judgment against the defendant for the sum of seventy-seven

thousand six hundred and eighteen and 24/100 ($77,-618.24) dollars, together with his costs and disbursements herein.

THOMAS F. McCUE,
Attorney for Plaintiff. [7]

State of California,
County of Alameda,—ss.

J. C. Walton, being first duly sworn, deposes and says: That he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents there; that the matters and things set forth therein are true of his own knowledge, except as to those matters and things stated upon information and belief and as to those matters and things he believes them to be true.

J. C. WALTON.

Subscribed and sworn to before me this 22d day of July, 1930.

[Seal] JOSEPH J. Y. YOUNG,
Notary Public in and for the County of Alameda, State of California.

[Endorsed]: Filed Aug. 1, 1930. [8]

[Title of Court and Cause.]

ANSWER OF DEFENDANT SOUTHERN PACIFIC COMPANY.

Comes now the defendant above named and answering plaintiff's complaint herein shows as follows:

I.

Answering the allegations of Paragraph I of plaintiff's first alleged cause of action, and the same allegations in so far as they are incorporated into the second alleged cause of action, defendant admits that some of its offices and officers are located within the jurisdiction of this court, but denies that all of its offices or officers are so located, and in this behalf alleges that its principal place of business is and was at all times mentioned in the complaint, located in the city of Anchorage, State of Kentucky. Upon the ground that this defendant has no information or belief upon the subject, sufficient to enable it to answer, it denies that plaintiff is, or at any time mentioned in the complaint, or herein, was, a resident of Alameda County, State of California, or the State of California, or was domiciled therein, or was resident or domiciled elsewhere than in [9] the State of Kentucky. Admits that with respect to some of the business and activities of defendant it is a common carrier by railroad, engaged in interstate commerce, but denies that it was engaged as a common carrier by railroad, or otherwise, or in interstate commerce, with reference to or relation to any matter referred to in the complaint. Denies each and every, all and singular, conjunctively and disjunctively, the other allegations of said Paragraph I.

II.

Answering the allegations of Paragraph II of plaintiff's first alleged cause of action, and the same allegations in so far as they are incorporated into plaintiff's second alleged cause of action, defendant

admits that it is a corporation incorporated and existing under the laws of the State of Kentucky, and domiciled in said state. Denies each and every, jointly and severally, conjunctively and disjunctively, the other allegations of said Paragraph II.

III.

Answering the allegations of Paragraph III of plaintiff's first alleged cause of action, and the same allegations in so far as they are incorporated into plaintiff's second alleged cause of action, defendant alleges that the accident referred to in the complaint herein, in so far as it is admitted to have happened by this answer, happened at about 3:15 o'clock, P. M., on the 25th day of March, 1930. Alleges that the part of the apparatus for supplying the locomotive with fuel oil which plaintiff handled, in connection with the refueling of locomotive 2604, on the occasion of the accident referred to in the complaint, was known as the oil spout, not the oil beam. Admits that while plaintiff was engaged in refueling said locomotive said locomotive [10] backed. Upon the ground that this defendant has no information or belief upon the subject sufficient to enable it to answer, it denies that the said locomotive engine or locomotive or engine backed automatically, or backed suddenly, or with any violence, or with such violence that plaintiff was in anywise or at all struck, or thrown in anywise or at all, or that thereby or in any way alleged in the complaint plaintiff was in anywise or at all injured.

IV.

Answering the allegations of Paragraph IV of

plaintiff's first alleged cause of action, and the same allegations in so far as they are incorporated into plaintiff's second alleged cause of action, defendant admits that prior to the receiving of any injury of which plaintiff complains, the locomotive engine upon which plaintiff was working was run under the oil spout by defendant's hostler for the purpose of supplying fuel oil to said engine. Denies each and every, jointly and severally, conjunctively and disjunctively, the other allegations of said Paragraph IV.

V.

Answering the allegations of Paragraph V of plaintiff's first alleged cause of action, defendant admits that at the time and on the occasion of the accident referred to in the complaint herein, plaintiff was engaged in supplying the locomotive referred to with fuel oil. Admits that said locomotive on some occasions, but not on any occasion referred to in the complaint herein, was assigned to handle and transport interstate commerce. Alleges that said locomotive on some occasions and at the time and on the occasion of the matters referred to in the complaint herein and in this answer was assigned to handle and transport only intrastate commerce. Denies each and every, all and singular, conjunctively [11] and disjunctively, the other allegations of said Paragraph V.

VI.

Answering the allegations of Paragraph VI of plaintiff's first alleged cause of action, defendant admits that plaintiff while working on the locomotive

referred to in the complaint herein, came in contact with a portion of the cab of said locomotive, and thereby received of the injuries referred to in the complaint the following: Bruises on his body, but in this behalf defendant alleges and says that they were minor bruises, and that plaintiff had completely recovered from the effects of said bruises by about the 14th day of April, 1930. Admits that on account of injuries received by coming in contact with the portion of said cab as aforesaid, plaintiff was confined in the White Memorial Hospital at Los Angeles, from March 26th, 1930, until the 14th of April, 1930, and that on the 15th of April, 1930, he was transferred to the Southern Pacific Hospital, in San Francisco, where he was confined until the 7th day of July, 1930, and in this behalf defendant alleges that on the 7th day of July, 1930, he left said hospital without the permission of defendant or the physicians employed by defendant, or the physicians then treating plaintiff and against the advice of said physicians. Admits that during said specified times plaintiff suffered such physical pain as was normally attendant upon the type of injury received by him, but denies that he suffered any mental or excruciating pain or any other pain, except such as is herein expressly admitted. Upon the ground that this defendant has no information or belief upon the subject sufficient to enable it to answer, it jointly and severally, conjunctively and disjunctively, denies the allegations of said Paragraph VI, that at the time of his injuries plaintiff [12] was the age of thirty-two years and an able-bodied, healthy man, and that he is still confined in a hospi-

tal and still suffering pain, both physical and mental. Admits that at the time and shortly prior to the time plaintiff was injured, as herein admitted, he was earning the sum of five and 07/100 dollars ($5.07) per day, seven days per week, but in this behalf alleges that the normal wages for the work for which plaintiff was employed before that time, and after the time of said injury, was and is the sum of two and 88/100 dollars ($2.88) per day, seven days per week, and no more, and that said rate of five and 07/100 dollars ($5.07) per day, seven days per week, was only an abnormal and temporary rate. Denies each and every, conjunctively and disjunctively, jointly and severally, the other allegations of said Paragraph VI.

VII.

Denies each and every, jointly and severally, conjunctively and disjunctively, the allegations of Paragraph VII of plaintiff's first alleged cause of action.

And answering plaintiff's second alleged cause of action, in addition to the showing heretofore made with respect to the allegations of the first cause of action incorporated in the plaintiff's second alleged cause of action, defendant shows as follows:

I.

Answering the allegations of Paragraph II of plaintiff's second alleged cause of action defendant admits that on the 25th day of March, 1930, plaintiff was employed by defendant as a hostler's helper, and at that time was receiving therefor compen-

sation at the rate of five and 07/100 dollars ($5.07) per [13] day, seven days per week, but in this behalf alleges that the normal wages for the work for which plaintiff was employed before that time, and after the time of said injury, was and is the sum of two and 88/100 dollars ($2.88) per day, seven days per week, and no more, and that said rate of five and 07/100 dollars ($5.07) per day, seven days per week, was only an abnormal and temporary rate. Admits that as part of the duties as said hostler's helper plaintiff was required to fill tanks of the locomotive engines of defendant with fuel oil. Denies each and every, conjunctively and disjunctively, jointly and severally, the remaining allegations of said Paragraph II.

II.

Denies each and every, jointly and severally, conjunctively and disjunctively, the allegations of Paragraph III of plaintiff's second alleged cause of action.

III.

Answering the allegations of Paragraph IV of plaintiff's second alleged cause of action, defendant admits that while plaintiff was working on the locomotive referred to in the complaint, he came in contact with a portion of the cab of said locomotive, and thereby received of the injuries referred to in the complaint the following: Bruises on his body; but in this behalf defendant alleges that said bruises were only minor bruises, and that plaintiff had completely recovered from the effects of the same by about the 14th day of April, 1930. Upon the

ground that this defendant has no information or belief upon the subject, sufficient to enable it to answer, it denies that by reason of any injury or matter alleged in the complaint, plaintiff was compelled or did employ any physician or surgeon, or in anywise or at all became liable for any hospital or nurse's or medical [14] attention or doctor's bill in the sum of two thousand dollars, or in any other sum, or that two thousand dollars ($2,000), or any sum, is the reasonable or usual charge or cost for said service, or any alleged service, or any service received by plaintiff, or that no part thereof has been paid. Denies each and every, jointly and severally, conjunctively and disjunctively, the other allegations of said Paragraph IV.

IV.

Answering the allegations of Paragraph V of plaintiff's second alleged cause of action, defendant admits the allegations contained in the first sentence of said numbered paragraph. Admits that plaintiff suffered the physical pain usually attendant upon the type of injury received by plaintiff and herein admitted, but denies that plaintiff suffered any other pain whatsoever. Admits that at the time of plaintiff's injury plaintiff was receiving the sum of five and 07/100 dollars ($5.07) per day, but in this behalf re-alleges the matter heretofore set out in Paragraph I of this answer to plaintiff's second alleged cause of action. Denies that any injury of plaintiff is permanent. Upon the ground that this defendant has no information

or belief upon the subject sufficient to enable it to answer, it denies, each and every, jointly and severally, conjunctively and disjunctively, the remaining allegations of said Paragraph V.

V.

Denies each and every, jointly and severally, conjunctively and disjunctively, the allegations of Paragraph VI of plaintiff's second alleged cause of action.

And for a second and separate defense as to each of plaintiff's alleged causes of action, defendant shows as follows: [15]

I.

At the time and on the occasion of the accident referred to in plaintiff's complaint herein plaintiff was employed by defendant as a hostler's helper, and had been so employed for a considerable period prior to the 25th day of March, 1930. At the time and on the occasion of the accident referred to plaintiff was thoroughly familiar with the character of his said employment and the duties incident thereto.

II.

At the time and on the occasion of the accident referred to, plaintiff, while engaged in his duties as aforesaid, was on the top of a tender of a locomotive of this defendant. While there, and in the performance of his said duties, and in loading fuel oil into the tender of said locomotive, said locomotive moved backwards, and as the same moved

plaintiff so carelessly and negligently conducted himself on the top of said tender, and in and about the performance of his said duties as hostler's helper as aforesaid, as to cause himself to fall against the top of the cab of said locomotive, and thereby received the injuries, if any, complained of.

And for a third and separate defense to both of plaintiff's alleged causes of action, defendant shows as follows:

I.

Incorporates by reference, as fully as though herein set forth at length, the allegations of Paragraph I of defendant's second defense to plaintiff's alleged causes of action.

II.

In the ordinary course of the performance of his duties as such hostler's helper; plaintiff was required to go upon the top [16] of tenders of locomotives and to fill tenders of locomotives with oil, and he was required to be on or about locomotives, both when the same were standing still and when the same were in motion. It was a normal condition of said locomotives, and of the top of the tenders thereof, that the same should be covered with oil to such an extent as might cause a person walking thereon to slip. Plaintiff's duties further required him to be on the top of tenders of locomotives and working about the tenders of locomotives while the same were in motion. All of the foregoing facts were at all times herein mentioned well known to plaintiff. In addition it was part

of the duties of plaintiff to place fuel oil in the tenders of locomotives, and plaintiff was well acquainted with the method of performing such duties and risks attendant thereon, and, particularly, the risk that said locomotive or tender might move while the same was being fueled, and the risks attendant upon such movement while the same were being fueled as aforesaid.

III.

Under all the circumstances aforesaid, at the time and on the occasion of the accident complained of by plaintiff, plaintiff was fueling a locomotive with fuel oil, and while the same was being so fueled the same moved, and as a result thereof plaintiff received the injuries, if any, complained of, and he received the same as herein alleged and not otherwise, and he received the same by reason of the risk of his said employment and a risk assumed by him in the course of his said employment.

And for a fourth and separate defense to both of plaintiff's alleged causes of action, defendant shows as follows:

I.

At the time and on the occasion of the accident referred [17] to in the complaint herein, plaintiff was engaged and employed by this defendant as a hostler's helper in intrastate commerce, and at the time and on the occasion of the accident of which plaintiff complains, plaintiff and defendant were engaged in intrastate commerce, and the in-

juries, if any, received by plaintiff, were received in the course of his said employment in intrastate commerce.

II.

At said time and on said occasion, defendant had secured the payment of any compensation which might be payable by it to any of its employees, engaged in intrastate commerce, within the State of California, and injured in the course of employment in said business, by qualifying as a self-insurer and by securing from the Industrial Accident Commission of the State of California a certificate of consent to self-insure, which certificate was then and there in full force and effect. Said certificate had been given by said Commission upon the furnishing of proof by defendant, Southern Pacific Company, which proof was satisfactory to said Commission, of the ability of defendant to carry its own insurance, and to pay any compensation that might become due to any of its employees.

III.

At the time and on the occasion of the accident referred to in the complaint herein, plaintiff was acting in the course and scope of employment in intrastate commerce in the State of California. This Honorable Court has no jurisdiction of the subject matter of the above-entitled action, nor of the parties thereto, and the Industrial Accident Commission of the State of California has sole jurisdiction to determine any and all matters with respect to the accident and injuries, if any there

were in [18] fact, referred to in plaintiff's complaint herein.

And for a fifth and separate defense to each of plaintiff's alleged causes of action, defendant shows as follows:

I.

Incorporates by reference, as fully as though, herein set forth at length the allegations of Paragraphs I and II of defendant's fourth and separate defense to each of plaintiff's alleged causes of action.

II.

After the accident referred to in the complaint, and after the receipt of such injuries as were received by plaintiff at said time and on said occasion, defendant performed all acts and did all things required of an employer, with respect to an injured employee engaged in intrastate commerce, and injured in the course and scope of his employment, in the State of California, as required by the statutes of the State of California, and particularly the Workmen's Compensation Act of the State of California, and tendered to and provided for plaintiff medical attention from the time of the accident, up until the 7th day of July, 1930, when plaintiff, against the advice of the physicians employed by defendant, and without their permission and consent, and without the permission and consent of defendant, left the hospital provided by defendant, and refused and does still refuse all further medical attention or service from defendant. Up to said

time defendant had provided all such medical, surgical, hospital, nursing, and other attention and service, as was required by such injuries as plaintiff had received. In addition thereto, after the accident referred to in plaintiff's complaint, defendant tendered to and paid to plaintiff, and plaintiff received from defendant, all pursuant to the Workmen's Compensation [19] Act of the State of California, compensation, and compensation required to be paid by an employer to an employee injured in intrastate commerce within the State of California, as required by the statutes of the State of California.

II.

Incorporates by reference, as fully as though herein set forth at length, the allegations of paragraph III of defendant's fourth and separate defense to plaintiff's alleged causes of action.

WHEREFORE, defendant prays that plaintiff take nothing by his complaint herein, and that defendant have judgment for its costs of suit, and for such other, further and different relief as, the premises considered, is proper.

DUNNE, DUNNE & COOK,
A. B. DUNNE,
Attorneys for Defendant. [20]

State of California,
City and County of San Francisco,—ss.

G. L. King, being first duly sworn, deposes and says:

That he is an officer, to wit, the Assistant Secre-

tary of Southern Pacific Company, a corporation, the defendant in the above-entitled action, and as such makes this verification, for and on behalf of said defendant; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated on information or belief, and that as to those matters he believes it to be true.

G. L. KING.

Subscribed and sworn to before me this 9th day of October, 1930.

[Notarial Seal] FRANK HANNEY,

Notary Public in and for the City and County of San Francisco, State of California.

Receipt of a copy of the within answer is hereby admitted this 10th day of October, 1930.

THOMAS F. McCUE,
Attorney for Plaintiff.

[Endorsed]: Filed Oct. 10, 1930. [21]

In the Southern Division of the United States District Court for the Northern District of California.

No. 18,791–K.

J. C. WALTON,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Defendant.

JUDGMENT ON NONSUIT.

This cause having come on regularly for trial on the 24th day of February, 1931, before the court and a jury of twelve men, duly impaneled and sworn to try the issues joined herein; Thomas F. McCue, Esquire, appearing as attorney for plaintiff, and A. B. Dunne, Esquire, appearing as attorney for defendant, and the trial having been proceeded with on the 25th day of February, 1931, in said year and term and oral and documentary evidence having been introduced on behalf of the plaintiff and the attorney for the defendant having, at the close of plaintiff's case, moved the court for a judgment of nonsuit, and the Court after hearing arguments and fully considering said motion, having ordered that said motion be granted and that a judgment of nonsuit be entered herein with costs to the defendant:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the court that plaintiff take nothing by this action, that judgment of nonsuit be and the same is hereby, entered against said plaintiff herein, that defendant go hereof without day, and that said defendant do have and recover of and from said plaintiff its costs herein expended taxed at $535.00.

Judgment entered February 25th, 1931.

WALTER B. MALING,
Clerk. [22]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that on the 24th day of February, 1931, the above-entitled cause being regularly on the calendar of the District Court of the United States for the Southern Division of the Northern District of California, came on regularly for trial before a jury and the Court. Thomas F. McCue appeared as attorney for plaintiff and Messrs. Dunne, Dunne and Cook, appeared for the defendant. Thereupon, the following proceedings were had.

Mr. McCue, as counsel for the plaintiff, made an opening statement for plaintiff, and in the course of said opening statement stated in part as follows: "On the 25th day of March, 1930, while the plaintiff was engaged by the defendant and working regularly as an assistant hostler—the evidence will develop that a hostler is a man who takes care of the engines after they are taken out of the daily service—he prepares them for the next day's service, in refueling them, that is, putting in fuel oil, as they do here and at other places, and the supplying of it with coal, and water, and sand. When "that is done the hostler takes the engine to the roundhouse. When the engine is called upon again the hostler takes it out of [23] the roundhouse and delivers it to the engineer or the man who is to take it from him. In a few words, that is about what we will show in regard to a hostler.

"We will show that Mr. Walton was at that time an assistant hostler. The assistant does practically the same work as a hostler, with the exception that he did not have charge of the operation of the engine; the hostler has charge of the engine. The duties of the assistant hostler require him to supply the tank or dome, or whatever they may call it, with fuel oil and with water, and with sand that is needed down in the sand-box, that is, if sand is needed down there he supplies the sand, and anything else that is needed in the nature of preparing the engine for its regular work, excepting the mechanical work, he has nothing to do with the mechanical part of it.

"The plaintiff was thus engaged on the 25th of March, 1930, in the yards. An engine that was used on the day shift that day, I think it went into service aroun*t* 7 o'clock or 7:30 in the morning, this was the only switch engine that was used during the shift of that engine. We expect to show that that particular engine, during that day and other days, was used indiscriminately in handling and switching cars that came from out of the state, cars that were billed in California to points outside the state, and it also handled some local shipments which, under the law, is called intrastate commerce; the other class of commerce, that is, that comes out of the state, or that is shipped from points in other states into California is called interstate commerce.

"That this engine, on March 25, 1930, when it had finished its shift, which the evidence will show to have been about ten minutes after three in the

afternoon, it was turned over to the hostler; that the hostler then took the engine on to a track that is called track No. 2." [24]

Mr. McCue further stated, as part of such statement, that the hostler then spotted the engine to take on supplies, and that the plaintiff assisted him, and while assisting and standing on top of the engine tender was injured when the engine was moved.

"Mr. DUNNE.—If your Honor please, in view of counsel's opening statement we can avoid a lot of trouble and perhaps a lots of documentary evidence by stipulating to certain facts. I will follow counsel's opening statement in offering to stipulate to those facts.

That, in the first place, Colton is a station on the line of the Southern Pacific, and that that station is on a part of the main line of the Southern Pacific, running out of Los Angeles and toward and across the Arizona border. We make no question about that.

Second: That at the station of Colton there is a switch-yard, and that that switch-yard is wholly within the state of California.

Thirdly: That in that switch-yard, and in the normal course of the business of this defendant, switching movements are made which are both interstate and intrastate in character.

Next: That the particular switch-engine in question was assigned to the Colton yard, and was used indiscriminately, to use counsel's own statement, in interstate and intrastate commerce.

And lastly: That on the day of this accident it had been on the seven o'clock in the morning shift; that that shift terminated at three o'clock in the afternoon normally, but there was a little bit of overtime carrying that particular time to 3:10 or 3:15; at any rate, that shift had been completed, the switching crew had brought the engine in and placed it on the roundhouse receiving track, and had left it and the hostler [25] had taken charge of it."

Mr. McCue, as counsel for the plaintiff, thereupon accepted said stipulation.

TESTIMONY OF. J. C. WALTON, ON HIS OWN BEHALF.

J. C. WALTON, on behalf of himself, testified as follows:

"I am the plaintiff; I am 32 years old; I was employed by the Southern Pacific Company in its yards at Colton, California, as a hostler's helper from January 2, 1930, to March 25, 1930, about 4 P. M., when I was hurt.

My duties as such were to line switches, taking engines around the wye, putting fuel oil in tanks, putting water in tanks, putting sand in the dome and filling lubricators. That was my orders from the roundhouse foreman; he was in charge of the work in that respect and is the main boss.

Q. On March 25, were you preparing engine No. 2604 there in the yards next day?

Mr. DUNNE.—That is objected to as immaterial, irrelevant, and incompetent, calling for his conclu-

(Testimony of J. C. Walton.)

sion as to what he was doing, and without foundation.

The COURT.—Objection overruled; exception.

A. Yes, for the next shift that it went out on; I don't know whether it was eleven o'clock that night when one went out or seven o'clock the next morning; the engine was supplied for one of those shifts.

Q. State whether or not that was a regular operation on your part in preparing this engine for going into the next service. A. Absolutely.

Q. Did you do that daily?

A. Daily on my shift, from 3 o'clock P. M. until 11 o'clock."

On March 25, 1930, Harry Lord, the hostler, was in charge [26] of engine No. 2604; I don't know from whom he received that engine on that day; the engineer who usually works that seven o'clock to three o'clock shift is Percy. When Lord received the engine I got on the front end and gave him a signal to back the oil-tank and water-tank. He did so. He spotted the engine for the sand-dome and I put sand in the dome on top of the engine and then walked back across the top of the engine and the cab and got over the oil-tank and gave him the signal to back up and spot it for oil. On this engine water and oil can be taken on the one spotting if you get it right; as soon as he spotted the engine at the place to take fuel oil, I was on top of the oil-tank. The engine was perfectly still; I walked back over the cab to the oil-manhole. Then

(Testimony of J. C. Walton.)

I gave the signal to back up. I was standing at the oil-hole. When I was in that position the hostler was taking water. When he spotted the engine and while I was on the tank he was pulling the throttle backing it up. He occupied the engineer's seat. When the engine was spotted I got the oil hook and pulled the beam over and opened the manhole. There is a big steel telescope that you put down to the manhole. Then I turned on the oil. This particular tank is low and the spout hardly comes plumb with the level of the hole but it comes far enough so that you can take oil easily without the oil splashing out. The mouth of the spout extends half an inch or an inch into the opening. You have to pull it full length. At that time when I pulled the spout down Lord, the hostler, was taking water. He came right up immediately when I told him we needed oil and while I was reaching for the hook and pulling the beam around he was taking water—getting ready to take water."

Q. Did he leave anybody in charge of the engine? A. No, sir.

"I turned around then and looked at my oil gage; the [27] engine was headed west; the oil gage is in the left-hand corner of the tank back of where the fireman sits. It is not near where the fireman sits but is back from there on top. I turned around to look at my gage, and as I turned around the engine watchman, Alfred Roxie, climbed into the cab; that is the first time I had seen him that afternoon on the shift, he went to work at

(Testimony of J. C. Walton.)

three o'clock. I spoke to him. He immediately put on the injector on the boiler—sat down in the fireman's seat and put his arm out like this. The purpose was to inject water into the boiler. I looked at my oil gage and saw the tank was about filled and turned around, caught the oil beam and started turning it slowly, to keep the tank from running over. The engine moved back while I was in that position, cutting off my oil; the oil spout struck me here (indicating his breast); it caused that to strike me in the chest because I was right against it turning it off; it knocked me off my balance; when the engine moved it only had to move that far to jerk the spout out, the oil was still running and it knocked me back across the cab.

I don't know who turned the oil off and I don't know who stopped the engine. I was conscious I would say for a minute. I was lying there. I just looked up and seen the steel beam, I had pulled down the telescope, the cab had jerked that off. Mr. Lord was taking water at the time I was hurt, I looked to see if I could see him, but he was gone. Then I don't remember any more. I don't remember getting off the engine. I don't remember anything after that, don't even know where they took me.

Q. You may state whether or not you know that that engine had at any time around that period, or during the time you were there, moved on other occasions of its own accord.

(Testimony of J. C. Walton.)

Mr. DUNNE.—That is objected to as immaterial, irrelevant and incompetent, what happened on other occasions under [28] different circumstances, as having no bearing on what happened on this particular occasion. It is without foundation. It calls for hearsay.

The COURT.—Objection overruled; exception.

A. On the 22d day of March, 1930, on that particular shift from 3 to 11, we coupled into 2604 with a 5,000 engine; that is, 5,000 and something. Mr. Lord said that we would supply both of them at once and then we will pull 2604 upon the track and cut it off. So I was riding, naturally, on the running-board of the engine, where you uncouple them. I gave him the signal to stop when we got up. He did. I pulled the pin. The engine started backwards. I had to run twenty or thirty steps to catch it.

Counsel for the defendant thereupon moved to strike out the testimony with respect to the movement of the engine on this occasion upon the ground that there was no similarity of circumstances shown, consequently no foundation and that the matter was immaterial, irrelevant and incompetent; that what happened on other occasions under different circumstances had no bearing on this case.

The COURT.—You may renew your motion.

From my experience as a hostler and working there in the yards, I know when a throttle is closed and shut off. When this engine on March 22, 1930, moved as I have described, Mr. Lord and I

(Testimony of J. C. Walton.)

examined the throttle. It was closed tight; Mr. Lord and I together told the machinist on duty, Cornelius Peters, that engine moved of its own accord. The track where this engine was spotted on this occasion was track No. 2.

From March 26 to April 14 I was in the White Memorial Hospital at Los Angeles. Then I was placed in the Southern Pacific Hospital at San Francisco, where I remained till July 7th, [29] I had to lie on my back for eighty-four days. After I left the Southern Pacific Hospital I employed Dr. W. L. Bell. He put a plaster of paris cast on me. Then he had this neck support. I cannot take the cast off at all. I can take this (neck support) off, but if I go a half a day without this brace on my neck the top of my head gets so sore I can't comb my hair on top.

My nerves are all torn up. I can't gain any strength at all. I have lost considerable weight; I cough and occasionally spit up blood. For a long time every day I had sinking spells; now about once a week I have sinking, smothering spells. I am short of breath all the time. Beads of perspiration pop out on me and I get deathly sick. I have terrible pains at the base of my head where the spine joins the brain. My neck and back pains all the time.

Prior to the accident for ten or fifteen years I cannot recall being sick. I had no doctor bills; had no pain in my body. At all times prior to the accident I was able to perform manual labor and

(Testimony of Dr. W. L. Bell.)

experienced no difficulty in performing it. I am not now able to perform any manual labor or railroad work.

TESTIMONY OF DR. W. L. BELL, FOR PLAINTIFF.

Dr. W. L. BELL, testified as follows:

My offices are in Oakland, California. I am a duly licensed and practicing physician and surgeon; have practiced for thirty-three years. My work has been mostly confined to bones for the last fourteen years. I met Walton in July, 1930. I have cared for him as a patient. I took his pulse. It was very irregular—from 70 to 120. 120 is a rapid pulse. In this case I think it indicates some nerve irritation, perhaps a muscular weakness of the heart, itself, as a result of his long illness. I have every reason to believe that the illness was caused by an injury. [30]

X-rays taken under the supervision of Dr. Bell were filed in evidence.

Q. You have stated that you tried to straighten his spine and though you attempted to do that it still has the curvature which that picture shows; is that correct? A. Yes.

Q. What would cause that curvature?

A. Compression, first, of the spinal column to throw it out of line, then later scarred tissue, muscular contraction. An injury is about the only thing it is the result of.

(Testimony of Dr. Etter.)

I think the condition I found on my several examinations of the patient is permanent and it is very doubtful that he will ever be able to perform manual labor.

TESTIMONY OF DR. ETTER, FOR PLAINTIFF.

Dr. ETTER testified:

I am a regular practicing physician and surgeon of California. I have followed neurology in my work particularly. I examined the plaintiff. The first time was on September 29, 1930. I put in the biggest part of an afternoon.

The patient complained of diminished sensation in certain regions, and with the pin-prick test you determine certain areas where he had a diminished sensation, and the areas where there was a lack of sensation. I put the pins in his person enough to make it bleed. I applied a test to the back of the head, back of the scalp, and in the region up above the ear, over the upper part of the shoulder, down the outer part of the arm, the right thumb, and the index finger, and part of the middle finger. He did not have the power in his right hand that he did in his left. Lack of power is produced by nerve injury. The muscolospiral nerve, the one that was particularly concerned in this case. In the back of the neck there is the occipital nerve and the auricular nerve. They all have their origin in the [31] cervical region. I should say that the lack of feeling and sensation in the arm, and

(Testimony of Dr. Etter.)

shoulder, and neck, and the part of the head was caused by a blood clot that would cause pressure. My deductions as to the condition of the nerves were that they were damaged. I would say that the damage or injury to the nerves would be more or less permanent after this length of time. The condition of the nerves which I have described I would say that it was a blood clot, and the formation of scar tissue that would pinch the nerves and cause pressure on the nerves. A severe blow or injury would cause rupture of a blood vessel. I would say that those conditions are permanent and that they are reasonably certain to continue and cause the plaintiff difficulty and pain throughout his life.

TESTIMONY OF J. C. WALTON, ON HIS OWN BEHALF (RECALLED).

J. C. WALTON, recalled, and resumed his testimony.

The plaintiff as to the balance of his direct examination gave testimony tending to show and explain his injuries.

Cross-examination by Mr. DUNNE.

At the time of the accident my shift was from three P. M., to eleven P. M. I have no memorandum to fix in my mind the date March 22d of the incident when engine 2604 was coupled on to engine 5000. It was shortly after the shift started on three o'clock on that day.

(Testimony of J. C. Walton.)

Q. Assuming that the brakes are not on, the reverser is centered, and the throttle is closed, is it your testimony that the only way to explain the movement of a locomotive is a throttle leak?

A. I would not say that.

Q. I say, is there anything other than a leaky throttle which will explain an engine moving under those circumstances?

A. There might be some defective parts that would cause it to move.

Q. What? A. I don't know.

Q. Suppose it were standing on a grade, Mr. Walton? A. With the air on?

Q. With the air off.

A. Of [32] course, anybody would know it would move then, but it was not on a grade down there.

Q. Will you say now positively that Track No. 2, near the water track at Colton at that time, did not have a slight grade eastward?

A. It is level now and was then.

Q. Did you have a conversation with a man from the Claims Department at the Southern Pacific Hospital with respect to the payment of compensation to you?

Mr. McCUE.—That is objected to as immaterial.

The COURT.—Objection overruled; exception.

A. With respect to compensation?

Mr. DUNNE.—Q. The payment of some money to you. We will not characterize it yet as compensation. The payment of some money to you.

(Testimony of J. C. Walton.)

A. Well, I can't remember the name, I remember somebody coming up there after I was there. I think I would know him if I were to see him. He is a big, tall man.

Q. Mr. Leure, does that help your memory?

A. I don't remember the name, at all. He came up—

Q. Just a moment. Do you recall that you had a conversation with him with respect to the payment of money?

A. Well, if that is the gentleman, if that is his name, I would not say it was until I saw the man, if I can see the man I can tell you positively "Yes" or "No."

Q. You did have some conversation with some man?

A. With some claim agent from Mr. Newman's office.

Q. Is it not a fact that in the course of that conversation that claims agent told you that your case fell under the California State Workmen's Compensation Act?

Mr. McCUE.—That is objected to as immaterial, irrelevant, and incompetent, not proper cross-examination, and not a proper question under the issues in this case. [33]

The COURT.—I suppose it is preliminary. Objection overruled; exception.

A. He might have, but that did not make me know whether he was telling the truth, or not.

Mr. DUNNE.—Q. Of course it didn't.

(Testimony of J. C. Walton.)

A. He might have. I won't say "yes" or "no." I don't know.

Q. You won't say that he did not?

A. I won't say that he did not. I don't remember the conversation. I remember talking to some claims agent, a big tall man from Mr. Newman's office. I would not remember the date, I would not try to, because I couldn't.

Q. Is it not a fact that during the course of that conversation you objected to the payment, taking the position that your case did not fall under the California State Workmen's Compensation Act?

Mr. McCUE.—The same objection.

The COURT.—The objection is overruled.

A. Well, if this was the gentleman, Mr. Dunne—what did you say his name was?

Q. Mr. Leure.

A. If it was Mr. Leure, a big, tall gentleman, he came over and placed his hands down on the bed—

The COURT.—Just answer the question.

Mr. DUNNE.—Q. Did you have such a conversation with him, in which the applicability of the California State Workmen's Compensation Act to your case was discussed?

Mr. McCUE.—The same objection as last interposed.

A. I don't remember.

Mr. DUNNE.—Q. Will you say you did not have such a conversation?

Mr. McCUE.—The same objection. Wait a moment.

(Testimony of J. C. Walton.)

Mr. DUNNE.—It is understood that to this line of questions [34] you have interposed the same objection, that it was overruled and an exception has been allowed, so that you will not have to repeat it. A. I won't say.

Q. I will ask you if after you had that conversation the Southern Pacific forwarded to you a voucher in payment to you under the California State Workmen's Compensation Act?

Mr. McCUE.—That is objected to for the reasons heretofore urged. There is no issue of that kind in this case. It is not within the issue. It is incompetent. This case is not based upon any compensation under any State law.

The COURT.—That is the heart of your objection, isn't it?

Mr. McCue.—Yes.

The COURT.—I don't know, but at this time I would say that the jurisdiction of this court in this case does not depend upon any conversation that these two gentlemen may have had. Is that your view?

Mr. DUNNE.—That is, of course, quite true, your Honor, but that conversation we now offer to prove, and it is specially pleaded in our answer, was followed up by the actual payment to this man and receipt by him of compensation under the so-called Workmen's Compensation Act.

The COURT.—The defendant is entitled to make that showing. Objection overruled; exception noted. Answer the question "Yes" or "No," if you remember.

(Testimony of J. C. Walton.)

A. Your Honor, can't I say why I accepted it?

Mr. DUNNE.—Q. I don't want to be unfair to the witness. Look at that paper writing, dated May 22, 1930.

A. I got a check, but I ask the Court to let me explain why I accepted that compensation.

Mr. DUNNE.—Q. Just look at that voucher, Mr. Walton, [35] and see if you did not receive that.

A. $175.28 for eight weeks compensation.

Q. Did you receive that voucher?

A. Yes, I received this voucher.

Q. Look on the back of it, and see if you did not forward it to your wife and have her endorse it and cash it? A. Yes.

Q. And that was paid to you.

A. That was paid to me.

Mr. DUNNE.—We will offer this in evidence. As this is the original record, your Honor, I ask to substitute a photostatic copy.

Mr. McCUE.—There will be no objection to the introduction of this document as was made to the testimony relative thereto.

The COURT.—Objection overruled. Exception.

Mr. DUNNE.—In introducing this, your Honor, I will ask leave to introduce the photostatic copy instead of the original. (The document was here marked Defendant's Exhibit "A." It is prayed that the original of said exhibit be attached to the transcript on appeal and forwarded with the same as part thereof to the Appellate Court.)

Mr. DUNNE.—Q. Now, Mr. Walton, don't you recall that in discussing this matter with a South-

(Testimony of J. C. Walton.)

ern Pacific Claims Agent, or at least a man who said he was that, they told you that when you gave the word thereafter they would send you compensation under the State Act every two weeks?

A. He didn't say that—

Mr. McCUE.—Wait a moment, the same objection.

The COURT.—You have the same objection. You don't have to repeat it. It is understood you have an objection to all this line of testimony, and the objection is overruled, [36] and an exception taken.

WITNESS. — (Continuing.) I received the paper now shown to me and received the payment called for on that voucher.

(Thereupon the paper referred to was offered and received in evidence, marked Defendant's Exhibit "B," and it is prayed that the original of said exhibit be attached to the transcript on appeal and forwarded with the same as part thereof to the Appellate Court.)

WITNESS.—(Continuing.) I got this paper (referring to paper exhibited). I remember getting three.

(Thereupon the paper referred to was offered and received in evidence, marked Defendant's Exhibit "C," and it is prayed that the original of said exhibit be attached to the transcript on appeal and forwarded with the same as part thereof to the Appellate Court.)

(Testimony of J. C. Walton.)

WITNESS.—(Continuing.) At the time I was employed by the Southern Pacific I had no prior railroading experience.

Redirect.

That place where the engine was standing and I was supplying it with fuel oil was level, apparently level. The reason why I say it was level, if I may speak this way, if the Court please, I have put that particular 2604 engine on the spot, myself, and supplied it there, and released the air, and it will be about, well, say, fifteen or twenty seconds until you get enough steam into the chest just to move it. So it did not move with me. I have coupled it on to other engines and pulled it up, like me and Mr. Lord did, to supply it, and spot it there for fuel and things—not it, but other engines like it, the 3700 type, the 2600 type, and the 5000 type, we have spotted them there with the engine in front and cut them [37] loose, no air on—the air was off—and they stood perfectly still.

TESTIMONY OF LELLA MAY WALTON, FOR PLAINTIFF.

LELLA MAY WALTON, called for the plaintiff —the wife of the plaintiff:

We have been married four years. I knew Mr. Walton for about six months before we were married. From the time we were married up until he was injured we lived together continuously as

(Testimony of Lella May Walton.)

husband and wife. I cannot say that he ever has been sick, not to the extent of being in bed.

I never knew of him to be unable to perform his usual work. He never complained of any pain prior to the time of his injury in this case. Since he was injured I observed that he has perspired. The perspiration is cold and clammy. In July, 1930, we lived in Oakland. I observed his appearance and actions during that time. He could not at that time sit in any position any length of time, not even to lie down. He kept us awake most of the night, off and on during the night, either getting up so that he could breathe better, or perhaps after he had sat up a while he would return to bed. He would get up frequently nights. That condition still exists.

TESTIMONY OF CHARLES HENRY ORTH, FOR PLAINTIFF.

CHARLES HENRY ORTH, called for the plaintiff.

For the last thirty years I have been a locomotive engineer. I have been employed by the Southern Pacific Company. After I left the Southern Pacific I was employed by the Northwestern Pacific for the period of twenty-two and a half years. They had oil-burning engines. They use oil for fuel.

I looked over engine No. 2604 yesterday. It was down in what they call the bull-pen, in Los Angeles yard. It had automatic air. It has a throttle that

(Testimony of Charles Henry Orth.)

you pull overhead. Such an engine as No. 2604 when the reverse lever is on center and the throttle is shut off or closed, and there is air on it, it would not move of its own volition if on a grade that is .53 of [38] 1% if it had the brakes set. I don't believe it would move if the air was released and the throttle shut off; on such a grade as you mention. When the engine is standing upon a location similar to that you have described and the throttle is closed that engine would not move backwards so that the spout that goes down into the manhole would be thrown out of place. That engine with the throttle closed and the grade being as you have stated it to be (.53 of 1%) a leaky throttle would cause the engine to move of its own volition.

Q. On such a grade, would you state whether or not the engine would not move of its own volition unless it did have a leaky throttle.

A. Leaky throttle.

Q. That is true, is it? A. Yes.

Mr. McCUE.—Mr. Dunne, have you those car records this morning?

Mr. DUNNE.—Yes.

Mr. McCUE.—Maybe you intended that the stipulation should cover those papers.

Mr. DUNNE.—I thought it did, Mr. McCue.

Mr. McCUE.—Probably we can save the introduction of these,—I notice here in your stipulation you speak about the normal business in the yard. May I ask you whether the business of the shift that

(Testimony of Charles Henry Orth.)

this engine went into next after the injury was the normal business of the yard?

Mr. DUNNE.—Yes, we will add that to the stipulation, that on the morning of March 25, 1930, the day of the accident, this locomotive, 2604, was engaged from 7 A. M. until a little after 3 in the afternoon in doing switching operations in the Colton yard and that on that day, and in the course of those switching operations was handling indiscriminately interstate and intrastate commerce, that is, one job, which was one and [39] then it would do another job, which was the other. Now, do you want it as to what happened after the accident?

Mr. McCUE.—The next shift.

Mr. DUNNE.—Now, as to the next shift, I will stipulate to the fact, with the objection that it is immaterial, irrelevant, and incompetent, that on the next shift, from eleven o'clock P. M. on the 25th of March, 1930, until the end of that shift, which would be 7 o'clock A. M. on March 26th, 1930, that locomotive was again engaged in similar service.

Mr. McCUE.—With that statement, I do not think it is necessary for you to produce the records and incumber this record.

Mr. DUNNE.—We are straight on this, Mr. McCue, that at the time this accident happened, however, the engine had finished its work on the morning shift.

(Testimony of J. C. Walton.)

Mr. McCUE.—I think the evidence clearly shows what took place; that is, as far as shift is concerned, as far as the engine performing any service itself was concerned in the nature of switching that day, when it was turned over to the hostler I apprehend that it had finished its shift.

Mr. DUNNE.—That is right.

Mr. McCUE.—With that statement, I will waive the production of the car records. I would like to recall Mr. Walton for a few questions I overlooked asking him yesterday.

TESTIMONY OF J. C. WALTON, ON HIS OWN BEHALF (RECALLED).

J. C. WALTON, recalled.

Q. Mr. Walton, did you know what the duties of the hostler in the Colton yard were during the period covered by this matter?

The COURT.—Now, just a moment; can't you gentlemen agree on what the duties of a hostler were?

Mr. DUNNE.—I think we can. A hostler is a person who is connected with the roundhouse, and whose duty it is to move [40] engines in and out of the roundhouse for purposes of services, receiving them, and taking them out again when assigned to duty.

The COURT.—When the engines come off what we might call the live tracks.

Mr. DUNNE.—When they come off the switch-

(Testimony of J. C. Walton.)

ing tracks they are put on the roundhouse receiving tracks, and are left there by their crews and the hostler goes on the engine and does whatever is necessary about the roundhouse, moving the engine, spotting it and taking on supplies, running it over the turntable, and putting it in the roundhouse, itself, to put it to sleep.

Mr. McCUE.—And also his duty is to handle the engine. His duty is to supervise the supplying. And I make this statement—

The COURT.—Do you stipulate to that Mr. Dunne?

Mr. DUNNE.—Yes, I will stipulate to that, but I will not stipulate to what Mr. McCue is going to say, because I know what he is going to say.

Mr. McCUE.—His duty is to handle the engines. The assistant hostler's duty is to supply the necessary things to replenish the engine. The hostler's duty is to handle and take care of the engine. If we can agree on that, all right.

Mr. DUNNE.—I will agree to that, but it does not go far enough. He also, himself, may at times assist in supplying the engine.

Mr. McCUE.—I don't agree to that.

Mr. DUNNE.—I know you don't. I knew you would not. We will have to let that rest on the proof.

Mr. DUNNE.—I object to any question to this witness on the ground that it is without foundation and calling for the conclusion of the witness.

(Testimony of J. C. Walton.)

The COURT.—He may testify to facts, and not to [41] conclusions.

Mr. McCUE.—Certainly, your Honor. It is not my purpose to ever call those things out.

The COURT.—Proceed.

(Question read by the reporter.)

A. Yes.

Q. You will please state what they were.

Mr. DUNNE.—I make the objection that it calls for the conclusion of the witness, and is without foundation. This man is not a hostler. No foundation is shown.

The COURT.—Q. This is the first time you ever worked with a hostler, is it not?

A. I worked, your Honor, off and on before I was assigned a steady job, a few times with a hostler.

Q. With a hostler? A. Yes, as extra.

The COURT.—I will overrule the objection; exception.

A. The hostler's duty was to have that engine in charge at all times, have it under his control at all times, sit in the engineer's seat, where he had access to the throttle, the air, and all the manipulations which run in stopping an engine while I was doing my work on the engine, until I got through.

Mr. DUNNE.—I move to strike that out, your Honor. It is simply an argument from the witness.

The COURT.—The motion is granted; exception noted.

TESTIMONY OF FINIS L. ASKEW, FOR PLAINTIFF.

FINIS L. ASKEW, called for the plaintiff.

I live in Oakland. My business for the last number of years has been a railroad man. In the capacity of brakeman. The first experience I ever had as a railroad man was as fireman. As a brakeman I performed the duties of what is known as the head brakeman a number of times. That requires you to be in and about of the engine, in the cab.

Q. Assuming that a locomotive engine that is commonly [42] called a Mogul, is spotted at a place for the purpose of being supplied with fuel oil and water on a surface that appears to be level; if the throttle and the other appurtenances to the engine are in working condition, if the throttle is closed or shut off, if the reverse lever is on center, and the air is on, will such an engine of that kind move of its own volition?

A. No, sir.

Assuming that the throttle and other appurtenances of the engine are in proper working order and the air is off, the engine will not move of its own volition.

If an engine of this character moved backwards, or kicked backwards, I could tell you why it did that. A leaky throttle would be the main thing.

Thereupon the plaintiff rested.

Mr. DUNNE.—If your Honor please, the defendant wants to move for a directed verdict at this time, and in view of the rather complicated

nature of this case, because there happens to be four different statutes which may possibly be involved, I want to particularize somewhat and move for a directed verdict upon the whole showing and upon the whole case; also separately to move for a directed verdict as to each of the counts, the complaint being in two counts.

In the next place, we move for a directed verdict as to any issue of any defect with respect to any part of the locomotive except the throttle, my other motions having already included the throttle. I now move, because there are general charges of defects to the appurtenances of the locomotive, over and above the throttle—and, of course, there has been no evidence directed at anything except the throttle in that regard. I also move for a directed verdict on the special defense, that this man was paid compensation and received it pursuant to the State [43] Act, and after a conversation and agreement had in that regard. We do not have to go beyond the riders in that behalf.

As supporting those motions, and as a separate motion, we renew the motions to strike out and move to strike out any testimony of the plaintiff with respect to the movement of any engines on occasions other than the occasions of the accident and to strike out the statements as to why this locomotive *move,* or why a locomotive could move, as simply being his conclusion or deduction, his guess as to why the locomotive moved. So much

for the motions, themselves. Now, as to the grounds for the motions: There are four possible statutes involved. There is the California State Workmen's Compensation Act. It is the position of the defendant that under that Act compensation is payable to this man, we are willing to pay it, we offered to pay it, and did pay it to him until he left the hospital against the doctor's orders. On that no question of negligence, or defect, or anything else arises. As your Honor knows, that California Statute is practically an insurance statute. If the employee is injured, it does not make any difference what the reason of the injury was, he is entitled to be paid his compensation under the jurisdiction of the Industrial Accident Commission of the State of California. The only defenses are defenses which, of course, are not involved here, intoxication on the part of the employee, and wilful disregard of safety orders.

The other three statutes which might possibly be involved are Federal statutes, and statutes which apply only to railroad companies. The first of those statutes is the Federal Employers' Liability Act, providing for a recovery by employees who are injured as a result of negligence, where the carrier and the employee at the time of the injury were both engaged in interstate commerce. So the vital things under that [44] statute are interstate commerce and negligence.

The other two statutes are the Boiler Inspection Act and the Safety Appliance Act. The Safety Appliance Act has nothing to do with the throttle. The

Safety Appliance Act deals with brakes, hand-rails, grab-irons, sill steps, and all that sort of thing, as to which there is absolutely no evidence in this case. So the Safety Appliance Act passes out of the picture, because there is no evidence directed to any defect provided for in the Safety Appliance Act—no evidence at all, your Honor, except as to the throttle. The throttle would fall under the Boiler Inspection Act.

The Boiler Inspection Act *in* this, that in the first place, it applies to all locomotives used by interstate carriers, whether at the particular time the locomotive was engaged in interstate commerce or not, provided that the carrier was engaged in interstate commerce. The United States Supreme Court has upheld the constitutionality of that statute upon the ground that where it is impractical to divide intrastate and interstate commerce movements, it is competent for Congress to cover the field.

As to the first alleged cause of action the motion is made upon the ground that there is no showing whatever that the locomotive involved here or the plaintiff were or either of them was engaged in interstate commerce at the time of the accident, within the meaning of the Federal Employer's Liability Act and that consequently the matter is one covered by the California Workmen's Compensation Act which provides the exclusive remedy and the exclusive jurisdiction of which is vested in the California Industrial Accident Commission, and upon the further ground that there is no proof

of any negligence with respect to the operation of the engine or in the particular alleged in the complaint. [45]

As to the second alleged cause of action the motion is made upon the ground that there is no showing whatsoever of any defect in the locomotive or any defect in the throttle of the locomotive.

The COURT.—You insist on pressing your motion, do you, Mr. Dunne?

Mr. DUNNE.—Yes, your Honor.

The COURT.—I always prefer, wherever it is possible, to submit a case of this kind to the jury for its verdict. I can do so, however, only where the plaintiff has shown some evidence to establish each necessary element in the proof of his cause of action. Where the plaintiff has failed to prove some necessary part of this cause of action it is my duty to grant a motion by the defendant for a nonsuit. This is in fact the fairer thing to do when the plaintiff is considered, as he may then, if he desires, appeal from my ruling. If the case goes to the jury, with proof lacking on some essential point, and the jury should find for the plaintiff, I would then be under the duty of granting a new trial. In the Federal courts there is no appeal from an order for a new trial and the plaintiff would have to go through the trouble and expense of an entire new trial before he could test my ruling as to the insufficiency of the evidence to sustain a judgment in his favor. Accordingly, in this case I shall grant defendant's motion for a nonsuit.

The first count of the complaint is based upon the Federal Employer's Liability Act. In order to recover upon this count plaintiff must prove that he was engaged in interstate commerce at the time of his injury. In this case the engine upon which plaintiff was working had been delivered to the roundhouse hostler after the close of a shift in which it had been used in both interstate and intrastate commerce. It was being [46] fueled prior to being run into the roundhouse to await its next assignment. There is no evidence to show that the next assignment would be in interstate commerce; I believe the evidence to be insufficient to show that the task in which plaintiff was engaged at the time he was hurt was so closely connected with interstate work that it was a necessary incident of such work and to be taken as part of interstate work.

The second count of the complaint is based upon an alleged violation of the Federal Boiler Inspection Act, in that defendant used its engine while its throttle, valves and steam chest and other appurtenances were defective. In order to maintain his action under this count, plaintiff need not prove that he was engaged in interstate commerce at the time of his injury to him, and that they were the proximate cause of the injury. After careful review of the evidence introduced by plaintiff, I cannot find that there is evidence of the existence of defects in the engine sufficient to take this case to the jury. In the first place, there is no direct evidence as to the existence of defects in the engine

at the time of the injury. There is only the evidence that it started to move. There is no evidence as to whether at that time the throttle was closed entirely nor as to whether the air-brakes were on or off. It is true that there is evidence that three days before this injury occurred the same engine did start spontaneously, with the throttle closed, but there is no evidence as to the setting of the brakes on that occasion, or as to whether they were on or off, nor is there direct evidence that this prior spontaneous starting was in fact due to a leaking valve. In other words, there is no positive evidence that the prior starting up was due to a defective valve, and even if this might reasonably [47] be inferred as to that occasion, the fact that it does not appear that the throttle was closed at the time of the accident with which we are concerned, makes the evidence as to the prior occurrence valueless for the purpose of proving the cause of the movement at the time of the accident. It is just as possible to infer that an open throttle caused the movement as it is to infer that some defect of the valve did so.

Let an exception be noted.

Mr. McCUE.—If the Court please, may I have thirty days in which to settle and allow a bill of exceptions?

The COURT.—Certainly.

Mr. DUNNE.—We will stipulate to that, your Honor.

The COURT.—Very well.

[Title of Court and Cause.]

STIPULATION.

It is hereby stipulated by and between the parties to the above-entitled action that the foregoing constitutes a true and correct bill of exceptions and the Judge who tried the same is requested to settle and allow the foregoing as the bill of exceptions herein.

THOMAS F. McCUE,
Attorney for Plaintiff.

_____,
Attorneys for Defendant.

[Title of Court and Cause.]

CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS.

I, A. F. St. Sure, one of the Judges of the United States District Court for the Northern District of California, do hereby certify that the foregoing pages of typewritten matter from 1 to 26, inclusive, constitutes a correct bill [48] of exceptions of the case and the same is hereby settled and allowed as the bill of exceptions herein.

It is hereby ordered that the Clerk of this court certify to the Circuit Court of Appeals Defendant's Exhibits "A," "B" and "C" in their original form as a part of the record herein.

Dated: This 23 day of March, 1931.

A. F. ST. SURE,
Judge.

Receipt of copy of the within bill of exceptions is hereby admitted this 20th day of March, 1931.

DUNNE, DUNNE & COOK,
A. B. DUNNE,
Attorneys for Defendant.

[Endorsed]: Filed Mar. 23, 1931. [49]

[Title of Court and Cause.]

PETITION FOR APPEAL.

J. C. Walton, plaintiff in the above-entitled action, feeling himself aggrieved by the decision of the Court sustaining defendant's motion for a nonsuit, and the entering of judgment herein on the 25th day of February, 1931, dismissing plaintiff's cause of action and for costs to defendant, and feeling himself aggrieved for that in and by said decision and judgment and for the errors committed to the prejudice of plaintiff, all of which more in detail appears from the assignment of errors which the plaintiff has filed herein, by reason thereof now comes Thomas F. McCue, plaintiff's attorney and petitions said Court for an order allowing the plaintiff to prosecute this appeal to the Honorable United States Circuit Court of Appeals for the Ninth Circuit under and according *with* the laws of the United States in that behalf made and provided;

and also that an order be made fixing the amount of the cost bond on appeal; and that a transcript of the record, proceedings and papers in this action, duly authenticated, be sent to said Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

THOMAS F. McCUE,
Attorney for Plaintiff and Appellant.

[Endorsed]: Filed Mar. 23, 1931. [50]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

The plaintiff in the above-entitled case says there is manifest error in the record herein committed by the trial court and alleges the following as such:

I.

The Court erred in striking out the answer of plaintiff in response to the following question, to wit:

> Mr. McCUE.—Mr. Walton, did you know what the duties of the hostler in the Colton yard were during the period covered by this matter? A. Yes.
>
> Q. You may state what they were.
>
> Mr. DUNNE.—I make the objection that it calls for the conclusion of the witness and it is without foundation, this man is not a hostler, no foundation is shown.
>
> The COURT.—I will overrule the objection. Exception.

A. The hostler's duty was to have that engine in charge at all times, have it under his control at all times, sit in the engineer's seat, where he had access to the throttle, the air, and all the manipulations which run in stopping an engine while I was doing my work on the engine, until I got through.

Mr. DUNNE.—I move to strike that out, your Honor, [51] it is simply an argument from the witness.

The COURT.—The motion is granted; exception noted.

II.

The Court erred in granting and sustaining the defendant's motion for a nonsuit.

III.

The Court erred in entering judgment dismissing plaintiff's complaint and awarding costs to the defendant.

THOMAS F. McCUE,
Attorney for Plaintiff.

Due service and receipt of copy of the foregoing assignment of errors is admitted this 20th day of March, 1931.

DUNNE, DUNNE & COOK,
A. B. DUNNE,
Attorneys for Defendant.

[Endorsed]: Filed Mar. 23, 1931. [52]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

Upon motion of Thomas F. McCue, attorney for the above-named plaintiff and appellant, and a petition for appeal having been filed herein,—

IT IS ORDERED that an appeal be and the same is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the ruling sustaining defendant's motion for nonsuit and the entering of the judgment herein on the 25th day of February, 1931, in favor of the defendant and against plaintiff, J. C. Walton, as by law provided.

IT IS FURTHER ORDERED that the cost bond on appeal herein be and the same is hereby fixed in the sum of two hundred and fifty ($250.00) dollars.

Dated: 23d March, 1931.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed Mar. 23, 1931. [53]

Premium charged for this bond is $10.00 for the term thereof.

[Title of Court and Cause.]

COST BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, J. C. Walton, as principal, and the United

States Fidelity and Guaranty Company, a corporation, of Baltimore, Md., as surety, are held and firmly bound unto the Southern Pacific Company, a corporation, its successors and assigns, in the sum of Two Hundred and Fifty ($250.00) Dollars, to be well and truly paid, for which payment we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 20th day of March, 1931.

The condition of the above obligation is such that, whereas said J. C. Walton, has appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from that judgment entered in the District Court of the United States for the Northern District of California, Southern Division, dismissing plaintiff's cause of action and granting costs to the defendant in a suit pending, wherein said J. C. Walton, is plaintiff and the Southern Pacific Company, is defendant, which judgment was entered in said court on the 25th day of February, 1931.

NOW, THEREFORE, if the appellant will prosecute said appeal and answer and pay all costs incurred on said appeal if he fails to make his plea good, then this obligation to be void; otherwise to remain in full force and effect.

This recognizance shall be deemed and construed to contain an "Express Agreement" for Summary

Judgment, and Execution [54] thereon, mentioned in Rule 34 of the District Court.

J. C. WALTON,
Principal.

UNITED STATES FIDELITY AND GUARANTY COMPANY.
By EARNEST W. COPELAND, (Seal)
Its Attorney-in-fact.

Form of bond and sufficiency of sureties approved March ——, 1931.

_____,
United States District Judge.

The foregoing bond is approved as to form and sufficiency.

March 23, 1931.

A. F. ST. SURE,
Judge.

State of California,
City and County of San Francisco,—ss.

On this 20th day of March, in the year one thousand nine hundred and thirty-one, before me, Amy B. Townsend, a notary public in and for the city and county of San Francisco, personally appeared Ernest W. Copeland, known to me to be the person whose name is subscribed to the within instrument as the attorney-in-fact of the United States Fidelity and Guaranty Company, and acknowledged to me that he subscribed the name of the United States

Fidelity and Guaranty Company thereto as principal and his own name as attorney-in-fact.

[Seal] AMY B. TOWNSEND,

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires October 29, 1934.

[Endorsed]: Filed Mar. 23, 1931. [55]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To Walter B. Maling, Clerk of the Above-entitled Court:

You will please prepare a transcript on appeal, including the following portion of the record, to wit:

1. Complaint.
2. Answer.
3. The final judgment.
4. The bill of exceptions.
5. Petition for appeal.
6. Assignment of errors.
7. Order allowing appeal.
8. Cost bond on appeal.
9. Citation on appeal.
10. This praecipe.

THOMAS F. McCUE,

Attorney for Plaintiff and Appellant.

Due service and receipt of a copy of the within praecipe is hereby admitted this 20th day of March, 1931.

DUNNE, DUNNE & COOK,
A. B. DUNNE,
Attorneys for Defendant.

[Endorsed]: Filed Mar. 23, 1931. [56]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing 56 pages, numbered from 1 to 56, inclusive, to be a full, true and correct copy of the record and proceedings as enumerated in the praecipe for record on appeal, as the same remain on file and of record in the above-entitled suit, in the office of the Clerk of said court, and that the same constitutes the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is $9.60; that the said amount was paid by the plaintiff and appellant, and that the original citation issued in said suit is hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 24th day of March, A. D. 1931.

[Seal] WALTER B. MALING,
Clerk United States District Court for the Northern District of California. [57]

[Title of Court and Cause.]

CITATION ON APPEAL.

To the Southern Pacific Company, a Corporation:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City and County of San Francisco, State of California, within thirty days from the date of this citation, pursuant to an appeal filed in the Clerk's office of the Southern Division of the United States District Court for the Northern District of California, whereof the plaintiff, J. C. Walton, is appellant and you are respondent, to show cause, if any there be, why the judgment appealed from should not be reversed and corrected and speedy justice should be done to the parties in that behalf.

WITNESS, the Honorable A. F. St. SURE, United States District Judge for the Northern District of California, this 23d day of March, 1930.

A. F. St. SURE,
United States District Judge.

Due service and receipt of a copy of the within citation is hereby admitted this 23d day of March, 1931.

DUNNE, DUNNE & COOK,
A. B. DUNNE,
Attorneys for Respondent. [58]

Receipt of copy of the within citation on appeal is hereby admitted this 23d day of March, 1931.

DUNNE, DUNNE & COOK,
A. B. DUNNE,
Attorneys for Defendant.

[Endorsed]: Filed Mar. 24, 1931.

[Endorsed]: No. 6421. United States Circuit Court of Appeals for the Ninth Circuit. J. C. Walton, Appellant, vs. Southern Pacific Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed March 24, 1931.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6421

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. C. WALTON,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,

Appellee.

BRIEF FOR APPELLEE.

GUY V. SHOUP,
65 Market Street,
San Francisco, California,

A. B. DUNNE,
DUNNE, DUNNE & COOK,
Insurance Exchange Building,
San Francisco, California.

Attorneys for Appellee.

Parker Printing Company, 545 Sansome Street, San Francisco

Index

Table of Cases

Pages

No. 6421

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. C. WALTON,
Appellant,

vs.

SOUTHERN PACIFIC COMPANY,
a corporation,
Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

Procedure in the Case.

This case came on for trial on plaintiff's complaint and defendant's answer. At the close of the plaintiff's case a motion for nonsuit was made, (R., pp. 51-55) and granted, the court rendering an oral opinion. (R., pp. 55-57.) Judgment for defendant was entered accordingly. (R., pp. 24, 25.)

The Pleadings.

Plaintiff's complaint was in two counts. The first four paragraphs of each count are the same, the sec-

ond count incorporating by reference the first four paragraphs of the first count. (R., p. 6.)

Paragraph I of the first count alleges that the action is brought against a common carrier, being a railroad in interstate commerce, and is brought under the Federal Employer's Liability Act; that defendant's principal place of business is within the jurisdiction, and that the plaintiff is a resident of Alameda County and domiciled therein. These allegations speak as of August 1st, 1930, when the complaint was filed. (R., pp. 1, 2—as to filing of the complaint, R., p. 10.) The answer to this (R., p. 11) puts in issue the material allegations of the first paragraph, particularly with respect to the residence and domicile of the plaintiff, and as to the defendant denies interstate commerce "with reference to or relation to any matter referred to in the complaint." Paragraph II of the complaint (R., p. 2) alleges that at all times defendant was a common carrier by railroad in interstate commerce, and at the time of the accident, both plaintiff and defendant were engaged in intrastate commerce. Issue was joined. (R., pp. 11-12.)

Paragraph III alleges that on March 25th, 1930, at Colton, California, plaintiff was employed by defendant as a hostler's helper, that his duties required him to supply engines with fuel oil, and that on that day he was on the tender of defendant's locomotive No. 2604 supplying it with oil, and as incidental thereto it was necessary for him to handle an oil beam. These allegations are admitted, but the time of the

accident is corrected from 4 o'clock, P. M., to 3:15 o'clock, P. M., and the name of the apparatus used is corrected from oil beam to oil spout. The complaint then alleges that while plaintiff was so engaged "said locomotive engine backed automatically", and with such violence that plaintiff was struck by the oil beam and thrown against the cab and injured. The answer admits that while plaintiff was engaged in refueling the locomotive it backed, but denies that it backed automatically or suddenly or with any violence or with such violence that plaintiff was struck or thrown. (R., p. 12.) Appellant's brief assumes to state in several places that the engine backed automatically. An issue was made in this regard—this is not an admitted fact. It is of course an admitted fact that the engine backed, and that as a result plaintiff was injured, but all of the allegations as to how it backed are denied.

Paragraph IV alleges that at the time of the injury the engine was run under the oil beam by the hostler to be supplied with oil. This is admitted. Then follow the charging parts of the first cause of action. It is alleged (1) that the hostler's duty required him to be in the engineer's place in the engine, and that instead of remaining there while the engine was being supplied with oil the hostler left the cab "without any one taking care of or being in control of the throttle, or air brakes; that by reason of the negligence and carelessness of defendant's hostler" (a) "in the handling and operation of said locomotive engine

at said time, and" (b) "on account of his failure to be in a position to control and keep said engine standing stationary" the engine automatically, suddenly and violently ran backwards and injured plaintiff; (2) that the engine was defective in that it had (a) a defective, leaky throttle, (b) the valves and air connections controlling the brakes were defective and out of repair, and (c) that when steam accumulated in the steam chest the throttle and valves and other connections and appurtenances were so out of repair and defective that they failed to hold the steam in its place; that by reason of (1) said defective condition of said engine, and (2) the failure of the hostler to remain in a position so he could control the engine, the engine ran away. (R., pp. 3-4.) All of these allegations are denied. (R., pp. 12-13.)

Paragraph V of the first cause of action (R., p. 4) then alleges that at the time of the accident plaintiff was supplying the engine with oil, preparing it to handle interstate commerce in interstate commerce traffic, and that the engine was being fueled preparatory to its use in interstate commerce, and that said engine was regularly assigned to handle interstate commerce. It will be noticed that these allegations undertake to characterize the engine as an instrumentality in interstate commerce, by reason of what will happen in the future, and by reason of the fact that it was then so definitely assigned to interstate commerce that it could be said that it was then being prepared for such commerce. It is admitted that the

engine was being supplied with oil, and that on some occasion "but not on any occasion referred to in the complaint", it was assigned to interstate commerce, and in this behalf it is alleged that at the time and on the occasion of the matters referred to in the complaint and in the answer, it was assigned "to handle and transport only intrastate commerce". (R., p. 13.)

Paragraphs VI and VII of the complaint then set out the alleged damage suffered. (R., pp. 4-6.) The answer admits certain of these allegations and puts the others in issue. (R., pp. 13-15.) The pleadings in this regard need not be detailed as no issue as to damages is presented here.

The second alleged cause of action, as already pointed out, incorporates by reference the first four paragraphs of the first cause of action, and the same answer is made to them as incorporated. In paragraph II of the second cause of action plaintiff sets out certain facts with respect to his employment, that his duties required him to supply locomotives with fuel oil and repeats the allegation that while at Colton he was on a tender supplying it with oil, that defendant's hostler, whose duty it was to remain in the cab and in control of the engine, negligently left his post of duty, leaving the engine unprotected, and that the engine suddenly and violently, of its own accord, ran backwards. Again, the answer admits that it was part of plaintiff's duty to fill the tanks with fuel oil, but denies that it was the hostler's duty to remain in the cab, that he negligently left the cab, and that the

engine backed violently or suddenly or of its own accord. (R., pp. 15-16.)

In paragraph III of the second cause of action plaintiff alleges that the defendant negligently and carelessly and "in violation of the Federal Boiler Inspection Act" (1) "failed to properly inspect said engine", and (2) used said engine and permitted it to be used while its (a) throttle, (b) valves and (c) steam chest and (d) other appurtenances were defective, in bad condition and unsafe to be operated in the service for which the same was being employed, and that by reason of the engine not having been sufficiently inspected and being unfit for service, plaintiff's injuries proximately resulted. The answer denies the allegations of this paragraph. (R., p. 16.) The rest of the second cause of action is taken up with a statement of injuries.

The answer then adds four separate defenses to each cause of action. The second and separate defense sets up plaintiff's contributory negligence. (R., pp. 18, 19.) The third and separate defense sets up assumption of risk. (R., pp. 19-20.) The fourth and separate defense sets up that the case falls within the Workmen's Compensation Act of the State of California, and that the Industrial Accident Commission provided for in said Act has sole jurisdiction of all matters with reference to plaintiff's injury. (R., pp. 20-22.) The fifth and separate defense sets up all of the facts contained in the fourth and separate defense, and in addition thereto, that defendant performed all

of the things required of it by the Compensation Act with respect to providing medical attention, and in addition paid to plaintiff and plaintiff received compensation, pursuant to said Act. (R., pp. 22-23.)

At the time the case went to trial, then, the pleadings admitted plaintiff's employment by the defendant, and his injury in the course of such employment. It is admitted that with respect to some of its business and activity the defendant is a common carrier by railroad engaged in interstate commerce. But issues were presented as to:

(1) Whether or not defendant was a common carrier by railroad engaged in interstate commerce at the time and in connection with the transaction, in the course of which plaintiff was injured;

(2) Whether or not at the time of his injury plaintiff was engaged in interstate commerce;

(3) Whether or not there was any negligence on the part of defendant with respect to the hostler leaving the cab, or with respect to the condition of the engine;

(4) Whether or not there was any defect in the locomotive such as would amount to a violation of the Boiler Inspection Act;

(5) Whether or not there was any proximate relation between any alleged negligence or defect, if any, and any injury to plaintiff, and

(6) Whether or not plaintiff was a resident and domiciled in Alameda County, California, at the commencement of the action.

In addition, assumption of risk was pleaded. Contributory negligence was set up but in so far as this action was under the Federal Employer's Liability Act that is not a defense in bar. The first defense with respect to the California Workmen's Compensation Act is of course only an affirmative statement of the denial of interstate commerce—that is, it applies only in the event that the transaction was one in intrastate commerce. The defense which adds to that the fact of acceptance of benefits under the Act of course presents a different problem.

The Facts.

On the 25th of March, 1930, the date of this accident, the defendant was a railroad company, and as to part of its activity engaged in interstate commerce. A part of its main line ran from Los Angeles toward and across the Arizona border. Colton was a station on this line. At Colton the defendant had a switch yard which was wholly within the State of California. (R., p. 28.) Plaintiff was employed by defendant, as he describes himself, as a hostler's helper, from January, 1930, to the time he was hurt on March 25th, 1930. (R., p. 29.) His duties included putting fuel oil in the tanks of locomotives. On March 25th he was preparing Engine No. 2604 "for the next shift that it

went out on; *I don't know whether it was 11 o'clock that night when one went out or 7 o'clock the next morning; the engine was supplied for one of those shifts.*" (R., pp. 29-30.) Lord, the hostler, had received this engine. When he received it the plaintiff got on and gave the signal to back. The engine was backed and spotted for the sand dome. Plaintiff, after putting sand in the dome, walked back across the top of the engine and the cab, got on the oil tank, and gave Lord the signal to back up and spot it for oil. On this particular engine water and oil can be taken with one spotting. Lord backed and spotted the engine to take oil, with the plaintiff on top of the oil tank. The engine was stopped perfectly still. When the engine was spotted the plaintiff pulled the oil beam over, opened the manhole, put the spout in the manhole and started to take oil. At that time when plaintiff "pulled the spout down, Lord, the hostler, was taking water. He came right up immediately when I told him we needed oil and while I was reaching for the hook and pulling the beam around he was taking water—getting ready to take water." (R., pp. 30-31.)

Lord left nobody in charge of the engine. After starting to take oil the plaintiff turned to look at his oil gauge, which was on the left-hand corner of the tank back of the fireman's seat. The engine was headed west. (R., p. 31.) The plaintiff was then on the west end of the tender next to the cab. As the plaintiff turned around to look at his gauge, Roxie, the en-

gine watchman, climbed into the cab. He immediately sat down on the fireman's seat and turned on the injector. The plaintiff looked at his gauge, saw that the tank was about filled, and turned around and started turning the oil beam. While he was in that position the engine moved back, the oil spout struck him across the chest, and knocked him off his balance. At this time Lord was still taking water. (R., pp. 31-33.)

This is the plaintiff's story. The plaintiff is the only one who testified as to any facts with respect to the accident. Such other testimony as was brought out will be touched on in discussing the precise issues presented.

ARGUMENT.

BURDEN OF PROOF.

It is an elementary proposition, which really needs no citation of authority, that before the plaintiff could recover here, he was required to sustain the burden of proving two things—a breach of some duty which the defendant owed to the plaintiff, and, second, that as a proximate result of that breach of duty the plaintiff was injured. If he fails as to either of these he can not recover. But the decisions of the United States Supreme Court, in cases such as this, have used more precise language, and language which is so apt here that we take the liberty of quoting it for the court's convenience.

The leading case, which has been repeatedly quoted, is *Patton v. Texas & P. R. Co.,* 179 U. S. 658, 45 L. ed. 361. The plaintiff was a fireman. He attempted to step off his engine. The step turned. He fell and was injured. A verdict was directed in favor of the defendant for failure on the part of the plaintiff to prove negligence of the defendant proximately causing the injury. The court first pointed out the function to be performed by the trial court in such a case, and the respect to be paid to the trial court's determination, and said:

> "At the same time, the Judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, *but one who in our jurisprudence stands charged with full responsibility. He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an appellate court will pay large respect for his judgment.*"

The court then said as to the facts and the failure of the plaintiff to make out a case:

> "Upon these facts we make these observations: First. That while, in the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of the carrier, a pre-

sumption which, in the absence of some explanation or proof to the contrary, is sufficient to sustain a verdict against him, for there is prima facie a breach of his contract to carry safely (citing cases) *a different rule obtains as to an employee. The fact of accident carries with it no presumption of negligence on the part of the employer; and it is an affirmative fact for the injured employee to establish that the employer was guilty of negligence.* (Texas etc. Co. v. Barrett, 166 U. S. 617.) Second. *That in the latter case it is not sufficient for the employee to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was.* And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, *it is not for the jury to guess between these half a dozen causes* and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony; and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

In *Northern Ry. Co. v. Page,* 274 U. S. 65, 71 L. ed. 929, a case where a passenger was suing, the court said:

> "The burden was on plaintiff to show that defendant's negligence, as specified above, was the proximate cause of his injuries. Under familiar rules, plaintiff was entitled to prevail if the evidence and the inferences that a jury might legitimately draw from it were fairly and reasonably sufficient to warrant a finding in his favor. Otherwise the judgment must be for defendant. *Chicago M. & St. P. R. Co. v. Coogan,* 271 U. S. 472, 478, 70 L. ed. 1041, 1045, 46 Sup. Ct. Rep. 564, and cases cited. *The verdict can not be sustained if essential facts are left in the realm of conjecture and speculation.*"

The *Coogan* case cited in the *Page* case was an action brought under the Federal Employer's Liability Act. The court pointed out that there the record left the matter "in the realm of speculation and conjecture. That is not enough." It further pointed out that in determining whether or not there was proof or mere conjecture or speculation the federal courts will follow their own rule. The court said:

> "The employer is liable for injury or death resulting in whole or in part from the negligence specified in the act; and proof of such negligence is essential to recovery. The kind or amount of evidence required to establish is not subject to the control of the several states. This court will examine the record, and if it is found that as matter of law, the evidence is not sufficient to sustain a finding that the carrier's negligence was a cause of the death, judgment against the carrier will be reversed."

In *New York Central R. Co. v. Ambrose,* 280 U. S. 486, 74 L. ed. 562, it was held that the plaintiff "completely failed to prove that the accident was proximately due to the negligence of the company. It follows that the verdict rests only upon speculation and conjecture, and can not be allowed to stand. *The utmost that can be said is that the accident may have resulted from any one of several causes, for some of which the company was responsible and for some of which it was not. This is not enough.*" The court then quotes at length from the *Patton* case.

In *Atchison etc. Co., v. Toops,* 281 U. S. 351, 74 L. ed., 896, the court said:

> "*But proof of negligence alone does not entitle the plaintiff to recover under the Federal Employer's Liability Act. The negligence complained of must be the cause of the injury. The jury may not be permitted to speculate as to its cause,* and the case must be withdrawn from its consideration unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer."

See, *accord:*

N. & O. etc. R. Co. v. Harris, 274 U. S. 367, 62 L. ed. 1167;

St. Louis etc. Co. v. Mills, 271 U. S. 344; 70 L. ed. 979;

Gulf etc. R. Co. v. Wells, 275 U. S. 455, 72 L. ed. 370;

Davlin v. Henry Ford & Son., 20 Fed. 317 (C. C. A. 6th).

The above cases indicate that the *Patton* case has been consistently followed. They further indicate that the rule is definitely established that the mere fact of injury in the course of employment does not make out a case for the employee, and is not proof, either of breach of duty by the defendant or of the proximate causal relation necessary.

The foregoing cases further point out that it is not enough that the plaintiff's proof is consistent with liability on the part of the defendant. It is not enough that the plaintiff's injury may have been due to negligence or other breach of duty on the defendant's part. If it is equally probable, under the evidence, that it may have happened from some other cause, the plaintiff has not made out his case. We repeat and emphasize this, because it is the crux of the case in hand.

Appellant at pages 18 and 19 of the brief undertakes to discuss the rule to be followed in considering the sufficiency of evidence on a motion for nonsuit. It is of course elementary that conflicts are to be resolved in favor of the plaintiff. It is likewise true that every "fair" inference in favor of plaintiff is to be drawn. But this does not mean that if there are two equally reasonable inferences only one of which is favorable to plaintiff, that inference in favor of plaintiff is a "fair" inference. The above cases show that it is not. There is nothing in the two federal cases cited on page 19 which is contrary to any of the above cases. The *Hotel Woodward* case simply makes a passing reference to the general rule. *Shadoan v. Ry. Co.,* 220 Fed. 68, decided by the Sixth Circuit

Court of Appeals was not a case where several inferences could be drawn. In a case which recognized the rule that where there are several equally reasonable inferences the jury cannot be permitted to guess as between them, that court expressly distinguished the *Shadoan* case.

Davlin v. Henry Ford & Son, supra.

In this connection we call attention to another well-established rule.

> "The view that a scintilla or modicum of conflicting evidence, irrespective of the character and measure of that to which it is opposed, necessarily requires a submission to the jury, has met with express disapproval in this jurisdiction as in many others."
>
> *Small Co. v. Lamborn & Co.,* 267 U. S. 248, 69 L. ed. 597.

> "*A mere scintilla of evidence is not enough to require the submission of an issue to the jury.* The decisions establish a more reasonable rule 'that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury may properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.' * * * Where the evidence upon any issue is all on one side or so overwhelmingly on one side as to leave no room to doubt what the fact is, the court should give a peremptory instruction

to the jury. (Citing cases.) *'When a plaintiff produces evidence that is consistent with an hypothesis that the defendant is not negligent, and also with one that he is, his proof tends to establish neither.' Ewing vs. Goode,* (by Taft, Circuit Judge) (C. C.) 78 Fed. 442, 444. See *Patton vs. Tex. & Pr. Co.,* 179 U. S. 658, 663, 45 L. ed. 361, 364, 21 Sup. Ct. Rep. 275; *N. Y. C. R. Co. v. Ambrose,* 280 U. S. 486, *ante,* 562, 50 Sup. Ct. Rep. 198."

Gunning v. Cooley, 281 U. S. 90, 74 L. ed. 720.

In so far as there is anything in *Rabe v. Western Union T. Co.,* 198 Cal. 294, in conflict with the above cases it will not be followed by this court. The federal courts in this regard have, and follow, their own rules. In *Conrad v. Wheelock,* 24 Fed. (2d) 996, 999, the court said:

"It has long been the rule in Illinois that, if there is any consistent evidence tending to establish the contention of the plaintiff, then it is the duty of the court to submit the cause to the jury."

It will be noticed that this statement of the Illinois rule is very much like the statement in the *Rabe* case. The court in the *Conrad* case goes on:

"*The federal rule is different.* Where the evidence is undisputed, or is so conclusive that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict in opposition to it, then it is the duty of the court to direct a verdict."

In *Ewing v. Goode,* 78 Fed. 442, cited with approval in *Gunning v. Cooley, supra,* Chief Justice Taft, then Circuit Judge, said:

> "The preliminary question for the court to settle in this case, therefore, is whether there is any evidence sufficient in law to sustain a verdict that the defendant was unskillful or negligent, and that his want of skill or care caused injury. In the courts of this and other states the rule is that if the party having the burden of proof offer a mere scintilla of evidence to support each necessary element of his case, however overwhelming the evidence to the contrary, the court must submit the issue thus made to the jury, with the power to set aside the verdict if found against the weight of the evidence. *In the federal courts this is not the rule.* According to their practice, if the party having the burden submits only a scintilla of evidence to sustain it, the court, instead of going through the useless form of submitting the issue to the jury, and correcting error, if made, by setting aside the verdict, may in the first instance direct the jury to return a verdict for the defendant."

Accord:

Chicago etc. R. Co. v. Coogan, 271 U. S. 472, 70 L. ed. 1041, quoted above.

PROOF NECESSARY IN VIEW OF THE ALLEGATIONS OF THE COMPLAINT.

In sustaining the burden of proof the plaintiff can not, in this case, be aided by any inference or pre-

sumption. In the first place, there is ample authority for the proposition that in the federal courts a servant suing his master is not entitled to invoke the so-called *res ipsa loquitur* doctrine. See the cases above, particularly the *Patton* case. "The maxim of *'res ipsa loquitur'* does not apply where the relationship of master and servant exists." (*American Car and Foundry Co. v. Schachlewich,* 229 Fed. 559 (C. C. A. 8th). But we need not urge such a broad proposition here. "It is the established law of the courts of the United States that, to hold a master responsible for injuries to a servant, the servant must show by substantive proof that the master was negligent *in the manner alleged in the complaint, and that such negligence was the cause of the injury."* (*American Car and Foundry Co. v. Schachlewich, supra.*) And where the charge in the complaint is specific, then that specific charge must be proved—proof that the defendant may have been guilty of breach of some duty toward the plaintiff, not necessarily the one specified, will not do. The Supreme Court of California in an opinion written by Judge Wilbur stated the rule as follows in an action brought in the state courts under the Federal Employer's Liability Act:

> "The general rule is that, where the plaintiff in his complaint gives the explanation of the cause of the accident, *that is to say, where the plaintiff, instead of relying upon a general allegation of negligence, sets out specifically the neg-*

ligent acts or omissions complained of, the doctrine of res ipsa loquitur does not apply."

Conner v. Atchison, etc. R. Co., 189 Cal. 1.

In *Marovitch v. Central California Traction Company,* 191 Cal. 295, opinion by Judge Myers, concurred in by Judge Wilbur, then Chief Justice of California, the court said:

> "It is clear that where the plaintiff in his complaint makes no general allegation of negligence, or no allegation of general negligence, instructions applying the doctrine of res ipsa loquitur should not be given. This must be so for the reason that in such case *the plaintiff can recover only upon proof of one or more of the specific acts or omissions alleged in his complaint."*

And this case was followed in *McKeon v. Lissner,* 193 Cal. 297, where the court said that the plaintiff "can recover only upon proof of one or more of the acts or omissions alleged in the complaint".

The federal rule is the same. The leading federal cases are *Midland Valley R. Co. v. Conner,* 217 Fed. 956 (C. C. A. 8th) and *White v. Chicago etc. Co.,* 246 Fed. 427. These cases are cited by the Circuit Court of Appeals for the Ninth Circuit in *The Great Northern,* 251 Fed. 826, a passenger case, where the court said:

> "Again, the general rule is that, where the plaintiff in an action for negligence specifically

sets out in full in what the negligence of the defendant consisted, the doctrine of res ipsa loquitur has no application."

Accord:

King v. Davis, 296 Fed. 986;
Bean v. Independent Torpedo Company, 4 Fed. (2d) 405;
Fed. Electric Co., Inc. v. Taylor, 19 Fed. (2d) 122.

THE STATUTES INVOLVED IN THE LIGHT OF THE PLEADINGS AND PROOF.

We have pointed out that the charges in the pleadings by which it is sought to impose liability on the defendant are of two kinds—charges of negligence with respect to the conduct of the hostler, Lord, and charges of defects with respect to the engine itself. This division is made because there are federal statutes which deal with defects in equipment, and whose application is not affected by any question of negligence in the management of the equipment. These statutes are the so-called Federal Safety Appliance Act, which, with its amendments, now forms § § 1-16 of Title 45 of the United States Code; the so-called Ash Pan Act, which has become § § 17-21 of Title 45 of the United States Code, and the Federal Boiler Inspection Act, which has become § § 22-34 of Title 45 of the United States Code.

(In this connection we pause to point out that the United States Code is not a new enactment and enacts and repeals nothing. The provisions of the Code are only prima facie the law. In the codification of these acts a curious error crept into § 7, Title 45, of the Code. The Safety Appliance Act provided that where there was any violation of *that Act* assumption of risk should not be available as a defense. This was § 8 of the original Act of 1893. *No such provision was contained in the Ash Pan Act or in the Boiler Inspection Act.* All three of these acts are grouped in Chapter 1 of Title 45 of the United States Code. Section 8 of the Safety Appliance Act became § 7 of Title 45 of the Code. The reference there made to the cases in which the defense of assumption of risk should not be available was changed from cases of injury from equipment used "contrary to the provisions of *this Act*" to "contrary to the provisions of *this Chapter*". Grouped as the Boiler Inspection Act and the Ash Pan Act are in the same chapter of the Code, this provision of § 7 is too sweeping and goes beyond the original provision in the Safety Appliance Act. We pause to point this out, because this fact has this significance—if an action is founded on the Boiler Inspection Act alone, and is not a case which would also fall under the Federal Employer's Liability Act, the doctrine of assumption of risk is still available in spite of a breach of the Boiler Inspection Act. This would not be true in case of a breach of the Safety Appliance Act.)

There is no claim of any defect which would bring the case within the Ash Pan Act. There were allegations in the complaint which, it might be said, were sufficiently broad to warrant proof of violation of the Safety Appliance Act. But the only proof which was in anyway attempted, of any defect, or want of equipment required by statute, was attempted proof of defect in the locomotive's throttle. Such a defect, if there were one, would make a case only under the Boiler Inspection Act. We can, therefore, disregard the Ash Pan Act and the Safety Appliance Act, and look only at the section of the Boiler Inspection Act which is involved. (§ 23 of Title 45 of the United States Code.) This section provides that it shall be unlawful for a carrier to permit to be used any locomotive unless the same, its boiler, tender and all parts and appurtenances "are in proper condition and safe to operate in service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb", and unless the same are inspected as provided by the Act. There is in this case no proof with respect to inspection at all. It will be presumed that the statute is obeyed, and that there was the inspection required.

PLAINTIFF FAILED TO SUSTAIN THE BURDEN OF PROVING A PRIMA FACIE CASE OF VIOLATION OF THE BOILER INSPECTION ACT.

On this phase of the case the question presented is whether or not the plaintiff sustained the burden of showing that the throttle was not "in proper condition and safe to operate in the service to which the same" was put, "that the same may be employed in the active service" of the defendant "without unnecessary peril to life or limb", and that his injury proximately resulted from such breach of duty.

The rule as to burden of proof is not different under the Boiler Inspection Act from the rule in any other case. In *Ford v. McAdoo,* 231 N. Y. 155, 131 N. E. 874, suit was brought for a death, claimed to have resulted from a defect in a locomotive which constituted a violation of the Boiler Inspection Act. A judgment for the plaintiff was reversed because the evidence was insufficient to sustain the verdict. The Court of Appeals of New York said:

> "In the face of two reasonable inferences, each of which is consistent with the happening of the accident, the plaintiff has failed to meet the burden which the law places upon her. * * * One is as reasonable as the other; neither preponderates in weight of argument or likelihood. When inferences are thus clearly consistent, the one with liability and the other with no cause of action, the plaintiff has not met the burden which the law places upon her."

A petition for a writ of certiorari was denied. (257 U. S. 641, 66 L. Ed. 411.)

The *Ford* case was followed in *Luce v. New York etc. Co.,* 205 N. Y. Supp. 273, 209 App. Div. 728, affirmed 239 N. Y. 601, 147 N. E. 212. The air pump on a locomotive had been squeaking and squealing. The engineer with the assistance of the fireman was working on it, both being on the ground. The engine moved and in some unknown way the engineer was run over and killed. There was no eye witness. The fireman had gone to the other side of the engine. A violation of the Boiler Inspection Act was claimed. The court said:

> "The burden of proof rested upon the plaintiff to prove, under the language of the Act, that the appurtenances of the locomotive were not in proper condition, and that they were not safe to operate in the service to which they were put, and to show the failure of the defendant to keep them in such state and proper condition, so as not to cause unnecessary peril to life or limb. * * * It is urged that the question of the condition of the engine is one of fact for the jury. In this case, it is a question of law. It is a failure of proof. The plaintiff has not proved any improper condition, nor any facts to show that the engine was not safe to operate in the service to which the same was put. The words 'proper condition' and 'safe to operate' must be read in connection with the words 'the service to which the same is put'. The engine might be in proper con-

dition for one purpose, and not safe to operate for another purpose; but the question to be solved, under the statute above quoted, is whether or not it meets the two requirements of being in proper condition and being safe to operate in the service to which the same is put, and not in some other service.

"Few authorities have been cited, and none need be, to solve the problem presented in this case. It has resolved itself into a question of sufficiency of proof. The Boiler Inspection Act requires a certain condition to exist. It is for the plaintiff to prove that it did not exist."

Compare the following cases where violations of the Safety Appliance Act were claimed. In *Midland etc. Co. v. Fulgham,* 181 Fed. 91 (C. C. A. 8th), the court said, after quoting at length, from *Patton v. Tex. & Pr. Co.,* supra:

"The case came to the trial court with the legal presumption that the defendant had furnished and maintained a lawful and operative lever and automatic coupler, for the legal presumption is that every one obeys the laws and discharges his duty. * * * The result is that the conclusion of the jury that the coupler was defective was a mere conjecture; that there was no evidence in the case of any such defect; that the legal presumption that the defendant had furnished and maintained a lawful coupler was not overcome, but still prevailed; * * *; and that the guess of the jury was without substantial evidence to sustain it.

> "The doctrine of res ipsa loquitur is inapplicable to actions between employers and employees for negligence or other wrongs. The happening of an accident which injures an employee raises no presumption of wrong or negligence by the employer. (Citing cases.)
>
> "Conjecture is an unsound and unjust foundation for a verdict. Juries may not legally guess the money or property of one litigant to another. Substantial evidence of the facts which constitute the cause of action—in this case of the alleged defect in the lift pin lever and the coupler—is indispensable to the maintenance of a verdict sustaining it."

See, *accord, McDonald v. Great Northern Ry. Co.,* 207 N. W. 194 (Minn.) where the court uses similar language as to conjectures and guesses of juries, and includes with juries witnesses. This thought will be commented on further.

In *Burnett v. Penna. R. Co.,* 33 Fed. (2d) 579, (C. C. A. 6th), the court said:

> "Even if it might be thought that plaintiff's proofs were consistent with the existence of a brake defect as the cause of this accident, they were at least equally consistent with the existence of some other effective cause. In such a case, there is no question for the jury."

This case was followed in *Kuhnheim v. Pennsylvania R. Co.,* 238 Fed. (2d) 1015 (C. C. A. 6th). Finally in applying the same rule the court in *Kansas*

City etc. Ry. Co. v. Wood, 262 S. W. 520, 523 (Tex.) said, quoting from *Ry. Co. v. Bounds,* 244 S. W. 1102 (Tex.):

> "It would be manifestly unfair to hold that the carrier had violated the statute until the inefficiency of the device had been disclosed by some reasonable test that would justify the conclusion that it was defective."

In the case in hand we have neither proof of a defective throttle nor proof of any causal connection between any condition of the throttle and plaintiff's injuries. We have in this case nothing but the bald unexplained fact that the engine moved. The facts in this regard have been stated above at page 8. That statement was not an outline. It was a full statement of the proof in the case.

There was not a word of evidence as to the condition of the throttle itself. There was no showing as to whether or not it had been looked at. There consequently was no direct evidence as to any defect in the throttle. But more than this there was no evidence of the results of any inspections. The Act requires that the engine be inspected. The rules of the Interstate Commerce Commission made pursuant to this statute, and of which judicial notice is taken by this court (*Thompson v. R. Co.,* 15 F. (2d) 28, 31 (C. C. A. 8th)), specifically provide for inspection of the interior and exterior of boilers (Rules 9-16), for an annual testing of boilers (Rule 17), which includes

the removal of the dome cap and the throttle standpipe (Rule 18), general monthly inspections and reports thereof (Rule 51), and inspection and report "after each trip or day's work." (Rule 104.) It is to be presumed that these reports were made as required. They must be filed as required by the Interstate Commerce Commission. Yet no attempt was made to produce any of these reports or to show from them any indication of any defect.

This accident happened within a few minutes after this engine had finished a shift. The plaintiff testified that he did not know from whom the hostler received the engine, but he did say that the engineer who usually worked that shift was Percy. (R., p. 30.) Yet no attempt was made by Percy or by any one else who had operated this engine, to show that there was any defect in the throttle. Lord, the hostler, who was handling the engine immediately before the accident, was not called nor any attempt made by him to show any defect. No attempt was made to show that any machinist who had ever worked on or around this engine had ever found any defect.

No attempt was made to produce any evidence of any difficulty in operating the throttle or of any steam leaks or other indications of a defect other than by inspection or operation. The record is an utter blank as to the throttle, and any fact in that regard. The only thing we have are some guesses of some witnesses, which will be dealt with presently.

There is no evidence in this case as to what actually happened in the operation of the locomotive. It appears that the hostler, Lord, stopped the engine, and then immediately got on the tender to take water. There is no evidence what he did with the brakes, whether he left them on or off, and if on whether the brake valve was left in the lap or service position, or was left partially in the release position, so that the brakes might leak off. There was no evidence as to how the reversing lever was left, whether in the center of the quadrant or in the forward or reverse position. The engine backed. If the reverser was in the forward position, then even if there had been a throttle leak the engine could not have backed, but would have gone forward. There is no evidence as to how the hostler left the throttle, whether closed or "cracked" or open. There is no evidence as to how the engine was brought to a stop; whether it coasted to a stop so that all steam pressure in the steam chamber and cylinders was already released, or whether it was stopped by use of the brakes with a head of steam still on the cylinder heads. There is no evidence as to whether or not the cylinder cocks were open so as to release any pressure which might remain on the cylinder heads. There is no evidence as to what went on in the cab of the locomotive after the hostler, Lord, left the cab. It does appear that Roxie, the engine watchman, climbed into the cab and turned on the injector. (R., p. 31.) It appears that he was in the cab before the engine moved. What else he did there does not appear.

It appears that the engine moved when the plaintiff was injured, and that it stopped. It does not appear how it was brought to a stop, whether it stopped itself, was stopped by applying the brakes, or was stopped by shutting the throttle.

Under these circumstances, it is impossible to say that the only fair inference to be drawn is, that there was a leaky throttle. It is an equally reasonable inference that the throttle was not closed. It is an equally reasonable inference that when the engine was stopped it was stopped with an unreleased head of steam on the cylinder heads. It is an equally reasonable inference that Roxie, the engine watchman, did something which caused the engine to move. These inferences are all inconsistent with any defect in the throttle, or any causal connection between any condition of the throttle and plaintiff's injury. There is little that can be added in this regard to the opinion of Judge Kerrigan, which will be found at pages 56 and 57 of the Record. There is, however, a federal case squarely in point.

In *Missouri etc. Ry. Co. v. Foreman,* 174 Fed. 377 (C. C. A. 8th), suit was brought for the death of freight conductor. The plaintiffs had a verdict and judgment thereon was reversed for insufficiency of the evidence to sustain the verdict. The facts were as follows:

The deceased was a conductor of a freight train. The drawhead on the car next to the engine pulled out. Because of other trains it was necessary to work

rapidly. The engineer immediately applied the brake, stopped the engine, and threw the reverse lever in the center of the quadrant as nearly as possible, got down from the engine and left it standing eight or ten feet from the car, leaving the fireman in the cab of the engine. Seeing what the trouble was the engineer went back to the engine, got a chain, and the deceased, the engineer, and a brakeman, were working between the rails chaining the car and engine together. (See pages 378 and 379.) At the point where the accident happened and where the engine stopped the track went downgrade going south, and the engine was going south. Accordingly, if it were to move by gravity, the engine would have moved away from the car. (Pages 382-383.) While the deceased, the engineer and the brakeman were thus working the engine backed upgrade and crushed the deceased between the drawhead of the engine and the car, killing him instantly. This suit followed.

In the complaint specific negligence was charged, it being charged that the air brake and appliances controlling the same were out of order and leaky, and that the throttle of the engine was out of order and leaked steam to such an extent as to cause the engine to move. Dealing with this question the court first quotes at length from the *Patton* case, and goes on:

> "As has been seen, plaintiffs charge in their petition such negligent act to have been committed by defendant in one of two ways: Either that defendant negligently permitted the air brakes and appliances to be and remain out of order and

in a leaky condition, which caused the brakes to release and the engine to move backward; or that the throttle of the engine was out of order and leaked steam to such an extent as to move the engine backward.

"If the efficient cause of the engine's backward movement originated in any act of the engineer himself, or of the fireman who remained on the engine, or in any other person, act, manner, or thing than those acts of negligence charged, plaintiffs may not recover, and it devolves upon the plaintiff to establish one or both of the negligent acts charged against defendant was the efficient cause of the moving of the engine to the exclusion of all others.

"The question now presented is: Did plaintiffs sustain the burden undertaken by them of producing evidence from which the jury was warranted in finding either or both acts of negligence charged was the efficient and proximate cause of the engine moving to the death of deceased? In other words, the evidence found in the record must return an answer to the question, what caused the engine to move? And that answer, when returned, must find either the one or the other, or both, of the negligent acts of defendant charged to exist as a fact, and such finding must be supported by the evidence, or the judgment entered may not stand."

The court then points out the significance of the fact that the engine moved upgrade, and then discusses a fact which does not appear in our case. The court says:

"Again, it is true, there is evidence in the record that the engine in question on the day of the accident leaked steam at the throttle; but the extent of such leakage is not shown, more than that the engine moved. It is argued, however, from these premises, as the engine did leak steam at the throttle, and as it did move backward, it will be presumed the engine must have leaked steam to such an extent as to show the railroad company negligent, or it would not have moved backward. This, however, is simply reasoning in a circle without established premises or necessarily correct conclusion, and for this reason: The presumption is that defendant furnished an engine reasonably suitable for the work to be performed by it, with appliances in reasonably safe condition for use; that is to say, it was not negligent in this regard. This presumption must be overcome by evidence before a recovery can be had on this ground.

"Again, the process of reasoning here employed is faulty and illogical, in that it bases the presumption of negligence on a presumption and not on an admitted or established fact; whereas a presumption of fact must be based on a known or established fact, and can never be founded on another presumption. (Citing and quoting from cases.)

"Again, it is further shown, by the same evidence, that all locomotive engines when in use leak steam to a greater or less extent at the throttle. Therefore, if this be true, the mere showing that this engine did leak steam at the throttle, without any showing of the extent, would

not support the charge made. *The fact is, it cannot be determined from the evidence in this case what caused the engine to move.*"

The court then discusses the question raised as to what the engineer did when he left the locomotive and points out that even if he left the locomotive as to brakes and the position of the reverse lever, so that it would move, and even if he were negligent in this respect, this would not help plaintiffs make out their charge that the throttle was out of order and leaked steam. There was evidence that this same engine had moved on another occasion when the engineer had left it, but the engineer who handled the locomotive on that occasion testified that he had released the brakes, and neglected to open the cylinder cocks, and thus relieved the pressure in the cylinder heads, and that this caused the locomotive to move. That explanation disposed of that evidence. The court then went on:

"Considering all the evidence found in the record, and giving to it all just inferences derivable therefrom, in our judgment, it was impossible for the jury to determine what caused the engine to move to the destruction of Foreman. Therefore the verdict returned is not supported by sufficient evidence and the court, in the exercise of sound discretion, should have granted the request to instruct a verdict for defendant. *Patton vs. Texas & Pacific Ry. Co., supra,* and cases cited."

To meet the foregoing appellant does not point to any fact or any testimony as to any fact. Appellant seeks to meet this by showing simply the guess of a locomotive engineer who was not shown to be in anywise qualified to testify to the mechanical plan and operation of a locomotive, as a mechanic, or to testify with respect to a locomotive in any way except upon the empiric basis of an engineer who had operated locomotives, and the guess of Askew, who had once been a fireman but whose principal qualification offered was that he had been a brakeman and had ridden in the cab of a locomotive. These two gentlemen upon the theory that they were qualified to give an opinion undertook to guess that the cause of the movement of a locomotive was a leaky throttle.

This court is familiar with the proposition that opinion testimony which is not satisfactory will not support a verdict. (See *Cummins v. Virginia Ry. Co.,* 130 S. E. 258, where an opinion had been offered as to the leakage in a valve controlling steam.) Such testimony is to be judged, first, by its own intrinsic worth. The bald assertion of an opinion does not amount to the more than a scintilla of evidence required by the federal cases. In *McDonald v. Great Northern Ry. Co.,* 207 N. W. 194 (Minn.), where the question was as to the effectiveness of operation of brakes, the court said:

> "McCabe's testimony as to the things from which an inference is sought to be drawn of defective automatic brakes is, under all the cir-

> cumstances, a mere guess. The improbability just mentioned makes it unsafe even as conjecture. It does not reach the dignity of proof. *Witnesses* and juries *must not be permitted to guess money or property from one person to another.* Substantial evidence must support those facts from which essential inferences are to be drawn for the support of a verdict. A verdict cannot rest on a conjectural foundation. * * * Liability is dependent on reasonably substantial proof."

In this regard we shall presently point out reasons why the guesses of these gentlemen are not substantial evidence in this case. But we pause now to point out that even on the assumption of fact made by these witnesses in making their guesses, their guesses were incorrect. These witnesses undertook to say that with the throttle closed and the reverse lever on center, two assumptions without foundation in the record, a leaky throttle would cause the engine to move. But this was contradicted by the plaintiff himself. Counsel for appellant seems to have overlooked the appellant's own testimony. He testified (R., p. 38):

> "Q. Assuming that the brakes are not on, the reverser is centered, and the throttle is closed, is it your testimony that the only way to explain the movement of a locomotive is a leaky throttle?
>
> "A. *I would not say that.*
>
> "Q. I say, is there anything other than a leaky throttle which will explain an engine moving under those circumstances?

"A. *There might be some defective parts that would cause it to move.*"

And we may add that it might move even if there were no defective parts, as, for instance, as shown in *Missouri etc. Ry. v. Foreman, supra,* if the engine were stopped with unreleased pressure in the cylinder heads.

There are, however, more exact and precise reasons, why the guesses of these witnesses must be disregarded. In the first place, the very matter in issue was whether or not (a) there was a leaky throttle, and (b) this caused the engine to move. This was the matter for decision by the jury, or, in the absence of substantial evidence, for the court. These witnesses could not by undertaking to guess as to these facts, conclude the court or the jury as to the very matters in issue.

> "The danger involved in receiving the opinion of a witness is that the jury may substitute such opinion for their own, and the courts will not require parties to encounter this danger unless some necessity therefor appears. Accordingly, where all the relative facts can be introduced in evidence, and the jury are competent to draw a reasonable inference therefrom, opinion evidence will not be received. In the application of this rule it has been held unnecessary to rely upon the inferences of witnesses as to a fact when all doubt has been, or may be, set at rest by the use of the senses, either directly or through the use of plans, photographs or other exhibits.

"As the opinion evidence rule is intended to provide against the mischief of invasion of the province of the jury, a court should as far as possible exclude the inference, conclusion or judgment of a witness as to the ultimate fact in issue, even though the circumstances presented are such as might warrant a relaxation of the rule excluding opinion but for this circumstance. And it is usually regarded as proper to adopt the same course as to facts which are highly material to the issue."

22 *C. J.*, 498-504, cited with approval in *St. Louis etc. Co. v. Barton, infra.*

"Whatever liberality may be allowed in calling for the opinions of experts or other witnesses, they must not usurp the province of the court and jury by drawing those conclusions of law or fact upon which the decision of the case depends. Although this view has been earnestly criticised it is sustained by the undoubted weight of authority, and *any lawyer who has had much participation in the actual trial of cases will understand that in many cases trials would become a mere farce if zealous experts were allowed to directly express their opinions upon the very issue to be tried.*"

Jones, Evidence, Civ. Cas., 3d Ed., § 372, p. 562.

The cases in support of this proposition are legion. We call attention only to a sufficient number to show that the federal and California rules are in accord.

In *Hatch v. U. S.*, 34 Fed. (2d) 436, 438-39 (C. C. A. 8th), a tax case, the court said:

> "Third, the questions called for conclusions of the witness as to the ultimate fact which the court was called upon to find, and for that reason the exclusion was proper."

In *Federal Electric Co., Inc. v. Taylor,* 19 Fed. (2d) 122 (C. C. A. 8th), the plaintiff had been injured when a shock from an electric sign upon which he was working threw him off a platform on which he was standing. An "expert" undertook to testify that the shock was due to a defect in the sign. The plaintiff had a verdict. On appeal this was reversed, and it was held that this opinion or guess might properly be disregarded.

In *St. Louis etc. Co. v. Barton,* 18 Fed. (2d) 96 (C. C. A. 5th), a pullman conductor was suing for injuries received when a train was derailed. There was a conflict in evidence as to the conditions which might have caused the derailment. Defendant's division engineer undertook to say that the derailment was caused by a broken rail. The court said:

> "The cause of the derailment being an ultimate fact to be determined by the jury, the court was not chargeable with error for sustaining an objection to a statement by the witness of his opinion on the subject."

In *Schmieder v. Barney,* 113 U. S. 645, 28 L. ed. 1130, 1131, the court said:

> "The effort was to put the opinion of commercial experts in the place of that of the jury upon

> a question which was as well understood by the community at large as by merchants and importers. This, it was decided in *Greenleaf v. Goodrich,* could not be done, and upon the point supposed to have been reserved in that decision this case stands just where that did."

In *Spokane etc. Co. v. U. S.,* 241 U. S. 344, 60 L. ed. 1037, the question presented was whether or not there had been a violation of the Safety Appliance Act. Judge Rudkin, then District Judge, had excluded the evidence upon the ground that it "invades the province of the jury". On appeal the judgment was affirmed by the Circuit Court of Appeals for the Ninth Circuit. 210 Fed. 243. The case was then taken to the Supreme Court on writ of error, and the judgment was affirmed, the court saying:

> "Without stopping to point out the inapposite-ness of the many authorities cited in support of the contention, we think the court was clearly right in holding that the question was not one for experts, and that the jury, after hearing the testimony and inspecting the openings, were competent to determine the issue, particularly in view of the full and clear instructions * * *."

In *Milwaukee etc. Ry. Co. v. Kellogg,* 94 U. S. 469, 24 L. ed. 256, 258, the court said:

> "The subject of proposed inquiry was a matter of common observation, upon which the lay or uneducated mind is capable of forming a judgment. In regard to such matters, experts are not

> permitted to state their conclusions. In questions of science their opinions are received, for in such questions scientific men have superior knowledge, and generally think alike. Not so in matters of common knowledge."

We pause to point out that in this case while the witnesses may have had superior knowledge, as to methods of operating a locomotive, the effect of a leaky throttle or an open throttle is a matter of common knowledge, and as to mechanical construction and operation of the locomotive, as a piece of machinery, as distinguished from its control by the engineer, they were not shown to have any superior knowledge. And of course as to the necessary element of causal connection, under no stretch of the imagination can that be said to be a matter for expert opinion in this case.

In *American Coal Co. v. DeWese,* 30 Fed. (2d) 349, (C. C. A. 4th), the court said:

> " 'Expert evidence touching matters of common knowledge is not admissible.' *Virginia Iron etc. Co. v. Tomlinson,* 104 Va. 249, 51 S. E. 362. 'Expert testimony can not be received either to prove, or to disprove, those things which the law supposes to lie within the common experience and common education.' Rodgers on Expert Testimony (2d Ed.) § 8; 1 Wharton on Evidence, § 436; *Johnston v. Mack Mfg. Co.,* 65 W. Va. 544, 64 S. E. 841, 24 L. R. A. (N. S.) 1189, 131 An. St. Rep. 979."

In *Safety etc. Co. v. Gould Coupler Co.,* 239 Fed. 861, 865 (C. C. A. 2d) the court said:

> "Opinion evidence, on the very point submitted for decision, is always incompetent."

In *Standard Fire Extinguisher Co. v. Heltman,* 194 Fed. 400 (C. C. A. 6th) the court said that the question of an expert,

> "called only for his conclusion as to the ultimate fact in issue, before the jury, and, under familiar rules, could not be received".

In *People v. Overacker,* 15 Cal. App. 620, 633, the court said:

> "That the matter upon which the witness was being examined was not proper to be proved by opinion evidence is established in the following cases *People v. Westlake,* 62 Cal. 309; *People v. Farley,* 124 Cal. 594, 57 Pac. 591; *People v. Milner,* 122 Cal. 181, 54 Pac. 833. In the case of *People v. Durrant,* 116 Cal. 217, 48 Pac. 85, it is said: 'Where the ultimate conclusion is one to be reached by the jury itself from the facts before it, and the so-called expert evidence is allowed, which presents to a jury a conclusion other than that to which they might have arrived, the admission of this improper testimony is tantamount to a declaration by the court that they may set aside their exclusive right of judging and accept the judgment of the expert.' "

Accord,

> *Cheney v. Employers' etc. Corp.,* 4 Fed. (2d) 826 (C. C. A. 9th);

Boyer v. U. S. F. & G. Co., 206 Cal. 273;
Davis v. Conn. F. Ins. Co., 156 Cal. 766;
Kroll v. Rasin, 96 Cal. App. 84.

There is a distinct reason why this "expert" testimony can not be considered. These gentlemen who testified were not giving their opinions based on any facts within their own observation. Their opinions were based entirely on an assumed state of facts—they testified in response to hypothetical questions or on an assumed hypothesis. It is apparent from the whole of the testimony of both Orth (R., p. 46) and Askew (R., p. 51)—appellant does not undertake to set out all of their testimony—that they were both assuming that the throttle was closed. Orth gave his opinion "when the reverse lever is on center and the throttle is shut off or closed"; "I don't believe it would move if the air was released and the throttle shut off". "When the engine is standing * * * and the throttle is closed". "That engine with the throttle closed". Askew's testimony was based upon the hypothesis "if the throttle is closed or shut off, if the reverse lever is on center".

There was no evidence that the reverse lever was on center. There was no evidence that the throttle was shut off.

> "As a rule hypothetical questions must be based on facts as to which there is such evidence that a jury might reasonably find that they are established."
>
> 22 *C. J.,* 714.

"If there is no testimony in the case tending to prove the facts assumed in the hypothetical question, such question is improper. The facts must be proved or offered to be proved; and if there is no evidence to prove such facts, or if the facts assumed, in the interrogatory are wholly irrelevant to the issue, the question should be excluded. If the foundation for the evidence is removed there is of course no basis for the superstructure. * * * The truth of facts assumed by the question is in doubtful cases a question for the jury; and if they find that the assumed facts are not proved, they should disregard the opinions based on such hypothetical questions; and the court will so instruct them. *But the court is not required to submit the matter to the jury, unless there is some substantial evidence tending to establish the hypothesis.*"

Jones, Evidence, Civ. Cas., 3d ed. § 371, pp. 559, 561.

In *Barnett v. Atchison etc. Ry. Co.,* 99 Cal. App. 310, 317 (hearing by Supreme Court denied) the court said:

"The opinion of a witness upon assumed facts differing from those shown by the evidence can not be given any probative force (*Estate of Purcell,* 164 Cal. 300, 308, 128 Pac. 932), and when such opinion is given in answer to a question which does not take the facts proved into consideration it is without value as evidence."

In *North Am. Acc. Ass'n. v. Woodson,* 64 Fed. 689, (C. C. A. 7th) the court said:

> "It is a proposition too simple to require any citation of authorities that the material facts assumed in a hypothetical question must be proven on the trial, or rather that there must be evidence on the trial tending to prove them. * * * Evidence of experts who are allowed to give an opinion is always attended with a sufficient degree of uncertainty and danger when founded upon an assumed state of facts which appear on the trial, on which the evidence tends to prove, and which the jury must find proven. If counsel can, in advance of knowing what he will be able to prove on the trial, frame his questions as he pleases, putting into them supposititious statements from his own invention and ingenuity, wholly unsupported by evidence, then the danger of this rather unreliable kind of testimony will be increased a hundred fold."

In *Union Pac. R. Co. v. McMican,* 194 Fed. 393, 396 (C. C. A. 8th), the court said:

> "Hypothetical questions should not embrace facts not in evidence. While counsel may base a hypothetical question upon his theory of the correctness of conflicting evidence, it is error to embrace facts which are not disclosed by the evidence."

In *Philadelphia etc. Co. v. Cannon,* 296 Fed. 302, 306, (C. C. A. 3d) the court said:

> "It scarcely needs the citation of authorities to sustain the proposition that a hypothetical

question calling for expert opinion must be based on facts in evidence. We are of opinion, therefore, that the question was improperly framed and the answer erroneously admitted. (Citing cases.)"

Accord:

Johnson v. Clark, 98 Cal. App. 358;
Erie R. Co. v. Linnekogel, 248 Fed. 389, 392 (C. C. A. 2d);
Harten v. Loffler, 212 U. S. 397, 53 L. ed. 568, 574.

The foregoing citations should be sufficient. If further cases are desired they will be found cited in *Corpus Juris* and in *Jones,* op. cit.

On this branch of the case it is now respectfully submitted that there was no attempt to show any defect as alleged except with respect to the throttle; that with respect to the throttle there is no evidence aside from the bald fact that the engine moved; that there are other inferences to explain this movement equally as reasonable as an inference of a defect in the throttle, that is, the inference that the throttle was open, or the inference that there was unreleased pressure in the cylinder heads, to mention only two. Under the circumstances there was nothing for the court to do but grant defendant's motion. When all is said and done there is little, if anything, which can be added to Judge Kerrigan's opinion on this point. (R., pp. 56-57.)

THERE WAS NO EVIDENCE TO SUPPORT THE CHARGE OF NEGLIGENCE ON THE PART OF THE HOSTLER.

The only charges in the complaint, other than charges of defects in the engine, upon which a cause of action could be rested, were the charges that the hostler in charge of the engine was negligent "in the handling and operation of said locomotive engine" and was negligent in failing to remain in the cab and in a position to control the engine. It will be noticed that these charges are very precise. It was *these* charges, not some other charge, that had to be proved. See cases pages 19 et seq. above and following.

There was no evidence at all to support the charge of negligence in handling or operating the engine. There is no evidence at all as to what the hostler did in handling and operating the engine. There is no claim now that the plaintiff's case can be supported on this charge. Plaintiff in this regard is remitted to the charge that the hostler was negligent in leaving the engine cab.

There is not a word of evidence upon which any claim of negligence on the part of the hostler can be founded as to this last charge. The evidence shows one thing, and one thing alone, and that is, that the hostler, after bringing the engine to a stop, did in fact leave the cab.

The appellant realizes this and seeks to meet this proposition by arguing that there was testimony that it was the duty of the hostler not to leave the cab,

that this evidence was improperly stricken out, and that this ruling of the court constitutes reversible error.

To this argument there are a number of answers. In the first place the striking out of this testimony was proper. In the second place, even if improper, the error was harmless. Had this testimony remained in the case and been believed still the court must have granted the motion for a nonsuit, on any one of three grounds, that is, want of a showing of proximate causal connection, showing of assumption of risk, and want of a showing of facts making applicable the Federal Employer's Liability Act. We take these propositions up in their order.

The only testimony attempted as to the duties of a hostler was that of the plaintiff, Walton, recalled on his own behalf (R., p. 48, et seq.). He was asked what the duties of a hostler were. Certain of the duties of a hostler were then stipulated to, and then, on behalf of the defendant, an objection was made "to any question to this witness on the ground that it is without foundation and calling for the conclusion of the witness." (R., pp. 48-49.) The following then occurred:

> "The COURT. He may testify to *facts,* and *not* to *conclusions.*
>
> "Mr. MCCUE. *Certainly, your Honor. It is not my purpose to ever call those things out.*
>
> "The COURT. Proceed."

The reporter then read the question, which was whether or not the plaintiff knew what a hostler's duties were. He answered "Yes". This, of course, was the baldest kind of a conclusion itself. The Record then goes on:

> "Q. You will please state what they were.
>
> "Mr. DUNNE. I make the objection that it calls for the conclusion of the witness and is without foundation. This man is not a hostler. No foundation is shown.
>
> "The COURT. Q. This is the first time you ever worked with a hostler, is it not?
>
> A. I worked, your Honor, off and on before I was assigned a steady job, a few times with a hostler.
>
> Q. With a hostler?
>
> A. Yes, as extra.
>
> The COURT. I will overrule the objection; exception.
>
> A. The hostler's duty was to have the engine in charge at all times, have it under his control at all times, sit in the engineer's seat, where he had access to the throttle, the air, and all manipulations which run in stopping an engine while I was doing my work on the engine, until I got through." (R., p. 50.)

This last answer was then stricken on motion. It was the worst sort of a conclusion and was utterly without foundation. No attempt was made to show that there were any rules or regulations or instructions governing the duties of a hostler. Nothing in the

way of an evidentiary fact is offered. The only thing offered is the conclusion of the witness, unsupported by any foundation other than his own conclusion that he knew what the duties were, and the fact that he had worked with a hostler a few times "as extra". Certainly a plaintiff can not be permitted to swear himself into court by stating any such conclusion as to the very matter which is to be submitted to the jury. Plaintiff had alleged in his complaint that this was the hostler's duty, and the verified answer had denied this. We need not repeat the argument and citations already made that opinions and conclusions as to the very matter to be decided by the jury can not be permitted. See above at page 38. We call particular attention to the language quoted from *Jones* above at page 39.

There is a distinct reason why the ruling of the lower court, in excluding this evidence, must be affirmed. The competency of a person to give an opinion is, in the first instance, a matter for decision by the court, and the trial court will be reversed only for plain error and abuse of its discretion. There is no such showing here.

The rule is plain. In the *Chateaugay etc. Co. v. Blake,* 144 U. S. 476, 36 L. ed. 510, 512, the court said:

> "How much knowledge a witness must possess before a party is entitled to his opinion as an expert is a matter which, in the nature of things, must be left largely to the discretion of the trial

court, and its ruling thereon will not be disturbed unless clearly erroneous. (Citing cases.)"

In *Congress etc. Co. v. Edgar,* 99 U. S. 645, 25 L. ed. 487, 490, the court said:

"Whether a witness is shown to be qualified or not as an expert, is a preliminary question to be determined in the first place by the court; and the rule is, that if the court admits the testimony, then it is for the jury to decide whether any, and if any what, weight is to be given to the testimony. Cases arise where it is very much a matter of discretion with the court whether to receive or exclude the evidence; but the appellate court will not reverse in such a case, unless the ruling is manifestly erroneous. (Citing cases.)"

In *Hamilton v. Empire etc. Co.,* 297 Fed. 422, 430 (C. C. A. 8th), the court said:

"The decision as to the qualification of an expert witness is peculiarly within the province of the trial court, and should not lightly be set aside. The trial court has a reasonable discretion in passing upon such qualifications which will be respected by the appellate court in the absence of a clearly erroneous ruling. (Citing cases.)"

The rule has been recognized and applied in this Circuit. In *Pacific etc. Co. v. Warm etc. Dis't.,* 270 Fed. 555, 558, this court said:

"It was for the court below to determine whether they were qualified to testify. In *Still-*

well Mfg. Co. vs. Phelps Railroad Co., 130 U. S. 520, 527, 9 Sup. Ct. 601, 603 (32 L. ed. 1035), Mr. Justice Gray said: 'Whether a witness called to testify to any matter of opinion has such qualifications and knowledge as to make his testimony admissible is a preliminary question for the judge presiding at the trial; 'and his decision of it is conclusive, unless clearly shown to be erroneous in matter of law.' And in *Montana Railway Co. vs. Warren,* 137 U. S. 348, 353, 11 Sup. Ct. 96, 97 (34 L. ed 681) Mr. Justice Brewer said: 'It is difficult to lay down any exact rule in respect to the amount of knowledge a witness must possess; and the determination of this matter rests largely in the discretion of the trial judge.' That rule was followed by this court in *Union Pac. Ry. Co. v. Novak,* 61 Fed. 573, 580, 9 C. C. A. 629."

Epperson v. Midwest Refining Co., 22 Fed. (2d) 622 (C. C. A. 8th);

Minnesota etc. Co. v. Swenson Evap. Co., 281 Fed. 622 (C. C. A. 8th);

Sacramento etc. Co. v. Soderman, 36 Fed. (2d) 934 (C. C. A. 9th).

Though it is obvious that the witness's own opinion as to his qualifications is no ground for questioning the court's determination, we give the cases on this proposition. In *Mars v. Panhandle etc. Co.,* 25 S. W. (2d) 1004, 1007, the court said:

"The statement of a witness that he testifies from his own knowledge does not necessarily qualify him to testify as an expert. He must

show that he has such experience and has such knowledge as would qualify him to testify as an expert."

Accord,

Staats v. Hausling, 50 N. Y. Supp. 222;
Snyder v. State, 70 Ind. 349.

For the converse proposition that a man may be qualified as an expert, although he says he is not, see *Southern etc. Co. v. Evans,* 116 S. W. 418, 422. The court after stating the general rule that the witness's qualifications were to be determined by the court, says of the witness's own statement in that regard:

> "His statements that he was or was not an expert would be mere conclusion upon his part, and his character should be determined by the qualifications which he exhibits rather than by his own conclusion."

Before appellant is entitled to a reversal appellant must not only show error in excluding this conclusion of the plaintiff but must show that such exclusion was prejudicial. If we make the rather violent assumption that the plaintiff should have been permitted to give this sweeping and general conclusion as to the hostler's duties, still that doesn't aid him. This testimony could not have changed the result. Even if it were in the case, and even if believed, the result must have been the same, because, assuming that breach of this duty was negligence, there was (1) no showing of

any causal connection between this assumed negligence and the injury, and (2) plaintiff assumed the risk of injury from the conduct of the hostler in leaving the cab.

THERE WAS NO PROXIMATE RELATION BETWEEN THE ACT OF THE HOSTLER IN LEAVING THE CAB AND PLAINTIFF'S INJURY.

No argument is necessary for the proposition that no recovery can be had under the Federal Employer's Liability Act for claimed negligence unless that negligence was a proximate cause of the injury complained of.

Atchison etc. Co. v. Sweringen, 239 U. S. 339, 60 L. ed. 317;
Atchison etc. Co. v. Toops, supra, p. 14;
New York C. R. Co. v. Ambrose, supra, p. 14;
Northern Ry. Co. v. Page, supra, p. 12;
Patton v. Tex. & P. R. Co., supra, p. 11.

There was no evidence at all as to how or why this engine moved. The facts in this regard need not be repeated. Plaintiff, having failed to show how or why the engine moved, certainly failed to show that anything that the hostler, Lord, did, or did not do, caused it to move, or that by remaining in the cab the hostler could have prevented it from moving. Indeed the fact that absence of somebody from the cab was not a proximate cause of the moving of the engine is demonstrated by the fact that it moved while there was

someone in the cab. Roxie, the engine watchman, got into the cab before the engine moved, and was there when it moved. If being in the cab would have prevented this accident, the engine watchman would have prevented it. A conclusion of proximate relation between the act of Lord in leaving the cab and the later movement of the engine can be founded only upon guess and speculation, unsupported by any suggestion of fact by the record.

PLAINTIFF ASSUMED THE RISK OF INJURY FROM ANY ASSUMED NEGLIGENCE ON THE PART OF THE HOSTLER IN LEAVING THE CAB.

It is elementary that assumption of risk is a defense in actions under the Federal Employer's Liability Act. The United States Supreme Court states the rule as follows:

> "It seems to us that § 4 in eliminating the defense of assumption of risk in the cases indicated quite plainly evidences the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action. * * * Contributory negligence involves the notion of some fault or breach of duty on the part of the employee; * * *. On the other hand, the assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employee. The risk may be present, notwithstanding the exercise of all reasonable care on his part. Some employments are

necessarily fraught with danger to the workman, —danger that must be and is confronted in the line of his duty. * * * And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care * * *. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them. * * * When the employee does know of the defect, and appreciates the risk that is attributable to it, then if he continues in the employment without objection, or without obtaining from the employer or his representative an assurance that the risk will be remedied, the employee assumes the risk even though it rises out of the master's breach of duty."

Seaboard Air Line Ry. v. Horton, 233 U. S. 492, 58 L. ed. 1062.

"And, except as provided in § 4 of the Act, the employee assumes the ordinary risks of his employment; and when obviously, or fully known and appreciated, he assumes the extraordinary risks *and those due to negligence of his employer and fellow employees.*"

Delaware etc. Co. v. Koske, 279 U. S. 7; 73 L. ed. 578.

The court has also had occasion to point out that the rule is peculiarily applicable where the employee's "knowledge of the situation and danger" "was at least equal to that chargeable against the defendant". (*Toledo etc. R. Co. v. Allen,* 276 U. S. 165, 72 L. ed. 513.)

And see, generally, *accord:*

Missouri etc. Co. v. Aeby, 275 U. S. 426, 72 L. ed. 351;

Baughan v. N. Y. etc. Co., 241 U. S. 237, 60 L. ed. 977;

Jacobs v. Southern R. Co., 241 U. S. 299, 60 L. ed. 970;

Southern Pacific Company v. Berkshire, 254 U. S. 415, 65 L. ed. 335.

For cases holding that the doctrine of assumption of risk applied where the employee was injured as a result of an act of a fellow servant see, particularly, the following:

C. & O. Ry. Co. v. DeAtley, 241 U. S. 310, 60 L. ed. 1016;

Chicago etc. Ry. v. Ward, 252 U. S. 18, 64 L. ed. 430;

C. & O. Ry. Co. v. Nixon, 271 U. S. 218, 70 L. ed. 914.

If we assume that it has been proved that Lord was negligent in leaving the cab, and if we make the farther assumption that there was proof that this negligence was a proximate cause of the injury, still, as

matter of law, plaintiff could not recover. He assumed the risk of injury from such act. The plaintiff was the one who called to Lord, and whose statement to Lord was what caused Lord to "immediately" leave the cab and get up on the tender and take water. This is the act. Plaintiff had notice of that act. His knowledge of the situation and danger was at least equal to that chargeable against Lord or the defendant. At that time he was in possession of all of the facts. The danger, if any, created by Lord's act in leaving the cab was as much open to his observation and was appreciated by him just as much as it could have been or was appreciated by anybody else. He had all the data before him and yet spoke no word of protest. He continued his work and assumed the existing situation.

Upon these violent assumptions the assumed negligence of Lord was in putting himself in a position where he could not control the engine if it moved. If there was this risk plaintiff knew it and assumed it. The fact is simple and extended argument can not make it any plainer than a simple statement.

It is respectfully submitted that any assumed error in striking the testimony of the plaintiff with respect to the duties of a hostler was harmless.

PLAINTIFF FAILED TO PROVE FACTS BRINGING HIS CASE WITHIN THE FEDERAL EMPLOYER'S LIABILITY ACT.

There is a distinct ground for denying plaintiff relief, which makes any assumed error with respect to

evidence as to negligence immaterial. Plaintiff founded his action so far as negligence is concerned on the Federal Employer's Liability Act. He failed to bring himself within the terms of that Act. The important section of that Act is the first, now § 51, Title 45, U. S. Code, and so far as material here it provides:

> "Every common carrier by railroad while engaged in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * for such injury * * * resulting in whole or in part from the negligence"

of a carrier or by reason of insufficiency of its equipment.

The question presented here is not the power of Congress to deal with injuries to employees of interstate carriers, but is a question of construction of an actual exercise of that power which, as will appear, falls short of the broadest scope of the power itself.

A reading of the Act indicates that "it is essential to a right of recovery under the Act not only that the carrier be engaged in interstate commerce at the time of the injury, but also that the person suffering the injury be then employed by the carrier in such commerce". He must be engaged "in such commerce" at the very time of his injury. "What his employment was on other occasions is immaterial, for, as before indicated the Act refers to the service being rendered when the injury was suffered".

(*Shanks v. Delaware, L. & W. R. Co.,* 239 U. S. 556, 60 L. ed. 436, 438.)

The authorities in support of the foregoing proposition are numerous, but the proposition is so important in this case that we take the liberty of quoting some of them. In *Chicago, B. & Q. R. Co. v. Harrington,* 241 U. S. 177, 60 L. ed. 941, a switchman was injured while moving cars loaded with coal from a storage track to the coal shed. It was held that no recovery could be had under the Act, as it was not shown that the cars were then engaged in interstate commerce. The court said:

> "So, also, as the question is with respect to the employment of the decedent at the time of the injury it is not important whether he has previously been engaged in interstate commerce, or that it was contemplated that he would be so engaged after his immediate duty had been performed."

In *Louisville & N. R. Co. v. Parker,* 242 U. S. 13, 61 L. ed. 119, a fireman on a switch engine was killed while moving an empty car from one switch track to another. The court applied the above rule, and said:

> "The difference is marked between a mere expectation that the act done would be followed by other work of a different character, as in *Illinois C. R. Co. vs. Behrens,* 233 U. S. 473, 478, 58 L. ed. 1051, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914C, 163, 10 N. C. C. A., 153, and doing the act for the purpose of furthering the later work."

In *Erie R. Co. v. Welsh,* 242 U. S. 303, 61 L. ed. 319, to be noticed in more detail presently, the court said:

> "By the terms of the Employer's Liability Act the true test is the nature of the work being done at the time of the injury, and the mere expectation that plaintiff would presently be called upon to perform a task in interstate commerce is not sufficient to bring the case within the Act."

Accord:

Illinois C. R. Co. v. Cousins, 241 U. S. 641, 60 L. ed. 1216;

Shanks v. Delaware L. & W. R. Co., supra;

N. Y. etc. R. Co. v. Carr, 238 U. S. 260, 59 L. ed. 1298;

Mayor v. Cent. Vt. Ry. Co., 26 Fed. (2d) 905, aff'd 26 Fed. 907, cert. den. 278 U. S. 624, 73 L. ed. 545.

The leading case is *Illinois C. R. Co. v. Behrens,* 233 U. S. 473, 58 L. ed. 1051. Appellant has undertaken to quote some of the language from that case. The isolated quotations are somewhat misleading. The court first points out what the power of Congress, under the Constitution, and with respect to regulation of interstate commerce, was. It is in this respect that the language quoted was used, the court pointing out that it entertained

> "no doubt that the liability of the carrier for injuries suffered by a member of the crew in the course of its general work was subject to regula-

> tion by Congress, whether the particular service being performed at the time of the injury, isolatedly considered, was in interstate or intrastate commerce."

But the court did not stop here as appellant did. It went on:

> "Passing from the question of power to that of its exercise, we find that the controlling provision in the Act of April 22, 1908, reads as follows:".

The court then quotes, and goes on:

> "Giving to the words 'suffering injury while he is employed by such carrier in such commerce' their natural meaning as we think must be done, it is clear that Congress intended to confine its action to injuries occurring when the particular service in which the employee is engaged is a part of interstate commerce. * * * Here, at the time of the fatal injury, the intestate was engaged in moving several cars, all loaded with intrastate freight, from one part of the city to another. * * * That he was expected, upon the completion of that task, to engage in another which would have been a part of interstate commerce, is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury."

Dealing with this same question the Court of Appeals of New York in *Carey v. N. Y. C. R. Co.,* 250 N. Y. 345, 165 N. E. 805, said:

> "The constitutional power to pass a statute is one thing, and the construction of a statute when enacted is another. The question before us here is not the constitutional power of Congress to extend the application of the Employer's Liability Act to operations less direct and immediate in their relation to interstate or foreign commerce. The question here is the meaning of the statute which it has chosen to adopt. * * * In adopting the Employer's Liability Act it chose to limit the protection by the nature of the present service."

Accord,

McBain v. Northern P. Ry. Co., 160 Pac. 654 (Mont.).

The second general proposition which, it is believed, is elementary, which is indicated if not expressed in so many words, in the above cases, but which is of the very highest importance is that the burden is upon the injured employee who seeks to avail himself of the federal act to show that his case is within the act. In *Johnson v. S. P. Co.,* 199 Cal. 126, 131, the deceased had been injured while riding on a cut of cars which were being switched. A nonsuit was granted and judgment affirmed upon the ground that it was not shown that these cars were moving in interstate commerce. The court said:

> "The burden is upon the plaintiff in this action to establish the fact that the defendant, at the very time when its employee through its negligence received the injuries which caused his death, was engaged in interstate commerce, the presump-

tion being, in the absence of such proof, that the employer while in the use and operation of its railway within the state was engaged in intrastate commerce. (*Terry vs. S. P. Co.,* 34 Cal. App. 330, 169 Pac. 86; *Bradbury vs. Chicago, R. I. & P. Ry. Co.,* 149 Iowa 51, 40 L. R. A. (N. S.) 684, 128 N. W. 1; *Osborne vs. Gray,* 241 U. S. 16, 60 L. ed. 865, 30 Sup. Ct. Rep. 486, see, also, Rose's U. S. Notes Supp.)"

Accord,

Lockhart v. S. P., 91 Cal. App. 770;
Carey v. N. Y. C. R. Co., supra;
Martin v. St. L.-S. F. Ry. Co., 258 S. W. 1023 (Mo.);
Phila. & R. Ry. Co. v. Cannon, 296 Fed. 302 (C. C. A. 3d);
Baldassarre v. Penn. R. Co., 24 Fed. (2d) 201 (C. C. A. 6th);
Onley v. Lehigh V. R. Co., 36 Fed. (2d) 705 (C. C. A. 2d), cert. den. 281 U. S. 743, 74 L. ed. 1156;
Hench v. Penn. R. Co., 246 Pa. St. 1, 91 Atl. 1056;
Rogers v. Canadian N. Ry. Co., 246 Mich. 399, 224 N. W. 429;
Carter v. Mo. Pac. R. Co., 119 So. 706 (La.).

The importance of keeping the general principles involved in the foreground is because

"each case must be decided in the light of the particular facts with a view of determining

> whether, at the time of the injury, the employee is engaged in interstate business, or in an act which is so directly and immediately connected with such business as substantially to form a part or a necessary incident thereof."
>
> *N. Y. etc. R. Co. v. Carr, supra.*

Now, as to what is interstate commerce within the meaning of the act. How is that question to be determined? The cases make it readily apparent that all activity of an interstate railroad, which may ultimately reflect upon or affect interstate commerce is not by that token alone itself interstate commerce. Thus, to take examples from activities in connection with supplying fuel, the mining of coal by an employee of an interstate railroad, which coal was to be used in engines while engaged in interstate commerce, is not interstate commerce. (*Delaware L. & W. R. Co. v. Yurkonis,* 238 U. S. 439, 59 L. ed. 1397.) So, where coal had come into a yard on cars and had been held in the cars on a storage track, movement of those cars to the coal shed, so that the coal could be put in bins and chutes, was not interstate commerce. (*C. B. & Q. R. Co. v. Harrington, supra; Lehigh V. R. Co. v. Barlow,* 244 U. S. 183, 61 L. ed. 1070.) In *Industrial Acc. Com'n v. Davis,* 259 U. S. 182, 66 L. ed. 888, the court said:

> "The federal act gives redress only for injuries received in interstate commerce. But how determine the commerce? Commerce is movement, and the work and general repair shops of a railroad, and those employed in them, are

accessories to that movement,—indeed, are necessary to it; but so are all attached to the railroad company,—officials, clerical, or mechanical. Against such a broad generalization of relation we, however, may instantly pronounce, and successively against lesser ones, until we come to the relation of the employment to the actual operation of the instrumentalities for a distinction between commerce and no commerce. In other words, we are brought to a consideration of degrees, and the test declared, that the employee, at the time of the injury, must be engaged in interstate transportation or in work so closely related to it as to be practically a part of it, in order to displace state jurisdiction and make applicable the federal act."

The leading statement of the test and the one most frequently quoted is that in *Shanks v. Delaware L. & W. R. Co., supra,* where the court said:

> "Having in mind the nature and usual course of the business to which the act relates and the evident purpose of Congress in adopting the act, we think it speaks of interstate commerce, not in a technical legal sense, but in a practical one better suited to the occasion, and that the true test of employment in such commerce in the sense intended is, Was the employee, at the time of the injury, engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?"

This test was stated and applied in the United States Supreme Court cases which have already been referred to and references is made to them here.

A very useful statement of the rule, because in a case where the facts were practically the same as those in the case at bar, and because of its review of the leading federal cases, is found in *Hines v. Industrial Acc. Com'n,* 184 Cal. 1, 14, where the court said:

> "From the foregoing authorities these principles are deducible: The general test as to the character of the employment is whether the employee was engaged in an act so directly and immediately connected with interstate business as substantially to form a part or necessary incident thereof. Thus, where the instrumentality upon which he was working was operating exclusively in interstate commerce, as in the Parker and Szary cases; or where the work which he was performing at the time of the accident would have the immediate effect of furthering interstate traffic, as in the Carr, Rolfe, Butler, Porter, Smith, and Collins cases; or where the employee had not yet completed his day's work, which included both interstate and intrastate transportation, as in the Winfield case; or where the instrumentality upon which he was laboring was a car loaded with commodities consigned to or from other states, as in the Morton and Hancock cases, an action under the Federal Employers' Liability Act is the exclusive remedy. But where the employee's work was only remotely connected with interstate commerce, as in the Yurkonis, Shanks, Harrington, Barlow, and Branson cases; or where the employee had completed a task which involved interstate traffic, and had not yet commenced a new task, as in the Welsh case; or where the instru-

mentality upon which the employee was working was, at the time of the injury, neither engaged in nor loaded with interstate traffic, as in the Winters case, then compensation may be awarded under a state compensation act. As was said by this court in the Butler case, 'the decisive consideration is always the closeness or remoteness of the particular work, as related to interstate transportation.' "

The leading cases are cited and classified in *Hallstein v. Penn. R. Co.,* 30 Fed. (2d) 594 (C. C. A. 6th), where the court said:

"Where work is being done by an employee upon or directly in connection with an instrumentality which itself is being used in interstate commerce and not withdrawn therefrom, such as tracks, bridges, water tanks and pumps connected therewith, locomotives or cars embarked or immediately about to embark upon such commerce, or undergoing running repairs, etc., the employee has been held to have been engaged in interstate commerce. (Citing cases, to which might be added *N. Y. C. R. Co. v. Marcone,* 281 U. S. 345, 74 L. ed. 892.)

"On the other hand, where the instrumentality upon which the employee is at work or in connection with which he is engaged is not directly connected with interstate transportation, or where such instrumentality has been withdrawn from or not yet dedicated to use in such commerce, although it may last have been so used or be intended ultimately for such use, it has repeatedly

been held that the work was not so closely related to interstate commerce as to be practically a part of it. (Citing cases.)"

It is at once apparent that of the instrumentalities used by an interstate railroad there is a classification into two major groups. The first group represents permanent structures, such as bridges, tanks, the tracks themselves, and the like. They are permanent in nature. If assigned to any particular use they must necessarily be permanently assigned and take character from the use to which they are assigned. If they are assigned to any use which is interstate in nature, they are permanently so assigned. The fact that they may be also and coincidentally used for intrastate purposes does not change the permanent nature of their assignment to interstate purposes. But this does not apply to the second classification of instrumentalities such as cars and engines, which may be assigned from one type of traffic to the other from time to time, and accordingly may, from time to time, change character. This distinction has been recognized. See cases cited below, and, particularly, the following:

Minneapolis etc. R. Co. v. Winters, 242 U. S. 353, 61 L. ed. 358;

Erie R. Co. v. Welsh, supra;

Industrial Acc. Com'n. v. Davis, supra;

Denver etc. Co. v. Ind. Com'n., 206 Pac. 1103 (Utah);

Hart v. Central R. Co., of N. J., 147 Atl. 733 (N. J.);
Payne v. Wynne, 233 S. W. 609 (Tex.).

The instrumentality here in question was an engine and falls into this second class.

There is a second distinction to be taken. The test stated in the *Shanks* case is twofold, and contemplates that an employee may be engaged in interstate commerce because engaged (a) in interstate transportation, or (b) in work so closely related to it as to be practically a part of it. The plaintiff in this case was certainly not engaged in interstate transportation, nor was he working on an instrumentality that was then engaged in interstate transportation. If he was engaged in interstate commerce it must be because he satisfies the second part of the test. This brings us to a consideration of the facts.

Most of the facts with respect to the question of interstate commerce were stipulated to, and that stipulation requires careful reading. It was stipulated as follows:

(1) At Colton, on the main line of this defendant, there was a switch yard. That switch yard was wholly within the State of California. (R., p. 28.)

(2) In that switch yard switching movements were made which were both interstate and intrastate in character. (R., p. 28.)

(3) The particular switch engine in question was assigned to the Colton yard. We call attention to the

fact that the only stipulation as to the assignment of this engine was, that it was assigned to the Colton yard. There was no stipulation that it was assigned to any particular type of traffic in that yard. (R., p. 28.)

(4) The engine was in fact used indiscriminately in interstate and intrastate commerce. (R., p. 28.) *Non constat* but that at any particular time selected it was engaged solely in intrastate commerce.

(5) On the particular morning in question this engine had been on the 7 o'clock shift. That shift normally terminated at 3 o'clock, but on this day there had been a little overtime carrying the shift to 3:10 or 3:15. (R., p. 29.) On that shift it was doing switching operations, and in the course of those switching operations was handling indiscriminately interstate and intrastate commerce, that is, one job, which was one, and then it would do another job, which was the other. (R., p. 47.) *Non constat* but that the last job it had done was an intrastate job. We again call attention to the fact that the burden of proof is on the plaintiff.

(6) That morning shift had been completed. *"The switching crew had brought the engine in and placed it on the roundhouse receiving track, and had left it, and the hostler had taken charge of it".* (R., p. 29.) In this connection a stipulation was entered into as to the duties of a hostler.

> "Mr. DUNNE. A hostler is a person who is *connected with the roundhouse,* and whose duty

it is to move engines in and out of the roundhouse for purposes of services, receiving them, and taking them out again *when* assigned to duty.

"The COURT. *When the engines come off what we might call the live tracks.*

"Mr. DUNNE. When they come off these switching tracks they are put on the *roundhouse receiving tracks,* and are left there by their crews and the hostler goes on the engine and does whatever is necessary about the *roundhouse,* moving the engine, spotting it and taking on supplies, running it over the turntable, and putting it in the roundhouse, itself, to put it to sleep."

(R,. pp. 48-49.)

See appellant's opening statement:

"A hostler is a man who takes care of the engines *after they are taken out of the daily service."* (R., p. 26.)

(7) Walton, over objection, testified, that when he was injured he was preparing the engine "for the next shift that it went out on; I don't know whether it was eleven o'clock that night when *one* went out or seven o'clock the next morning; the engine was supplied for one of those shifts". (R., p. 30.) This testimony was objected to upon the ground that it was a mere conclusion, and that it was without foundation. But the greatest effect that can be given it is, that Walton was preparing the engine for the next work which it might do. There is no testimony that at that time it was assigned to any particular work. *Non constat* but that

the next work to which it would be assigned would be intrastate commerce. We shall point out that the next work that it in fact did is immaterial. The test is, was it assigned to any interstate work at the time of the injury? There is no proof that it was.

(8) It was stipulated over objection as to competency and materiality, on the engine's next shift it was engaged "in similar service"—that is, doing one job which was interstate commerce and then another job which was intrastate commerce. At the same time it was stipulated, "that at the time this accident happened, however, the engine had finished its work on the morning shift". (R., p. 47.) *Non constat* but that the first work on the new shift was intrastate work. There was no stipulation as to what work, if any, the engine was assigned to at the time of the accident. There was no stipulation even that it was then assigned to the eleven o'clock shift. The only stipulation was that when in fact it did go back into service, it went onto the eleven o'clock shift.

(9) The plaintiff further testified, that when the engine was spotted for oil he told the holster that, "we needed oil". (R., p. 31.) Evidently the engine could not have proceeded with further work.

This is what the record shows. Now, as to what it does not show:

(1) There is no showing as to what proportion of interstate or intrastate commerce was handled at any time in the Colton yard or by this engine.

(2) There is no showing as to the proportion of intrastate commerce handled by this engine on the morning shift and there was no showing what this engine's last move was—whether interstate or intrastate. Here again the plaintiff's proof failed.

(3) There is no showing that this engine was assigned to any job at all at the time of the accident, much less to an interstate job. The only showing is that it had finished one shift, had left the live tracks, and had gone onto the roundhouse receiving track, and had been left by its crew. It was out of service.

(4) There was no showing what the engine's next move was, when it in fact went back into service.

(5) There was no showing what other switch engines were available at the Colton yard, and whether at the time this engine finished its shift there was any necessity that it should ever go back into switching service there. It was not going out to a job. It was not on its way back from a job, but had come back and finished its movement in that behalf. There was no showing at the time of the accident it would ever have to go out on another job.

When the foregoing facts are measured by the test of the cases it is apparent that this engine was not permanently assigned to interstate commerce; that it was assigned to work which was first interstate in character, and then intrastate in character, and that plaintiff has failed to sustain the burden of proof that

at the moment in question it had an interstate character. It is also apparent that under the general test plaintiff was not engaged in work so closely connected with interstate commerce, "as to be practically a part of it". The cases which have dealt with analogous situations amply warrant this conclusion.

In the first place, the problem presented by a switch engine is considerably different from that presented by a road engine. A road engine assigned to an interstate run has an interstate character until that run is completed—until having left the roundhouse at which it is located it has made its round trip and returned to that roundhouse. Until it is back in the roundhouse and withdrawn from service it is doing a single and an indivisible task. With switching it is different. In *Erie R. Co. v. Welsh, supra,* as to whether or not a switch engine and its crew were engaged in interstate commerce, the court said:

> "And this depends upon whether the series of acts that he had last performed was properly to be regarded as a succession of separate tasks or as a single and indivisible task."

The court held that it was to be regarded as a series of separate tasks. Other cases have repeatedly held that in the case of switching operations, there is no "general work" which lends color to all of the work, but that a switching crew is engaged in interstate or intrastate commerce depending upon the work that it is doing at a particular time. There are points of time when it can be said that the engine, while in

actual operation, is not engaged in interstate commerce, but is engaged solely in intrastate commerce.

The leading case is *Illinois C. R. Co. v. Behrens, supra.* The intestate was a fireman and "member of a crew attached to a switch engine operated exclusively within the City of New Orleans". The court summarizes the facts as follows:

> "In short, the crew handled interstate and intrastate traffic indiscriminately, frequently moving both at once, and at times turning directly from one to the other. At the time of the collision the crew was moving several cars loaded with freight which was wholly intrastate, and upon completing that movement was to have gathered up and taken to other points several other cars as a step or link in their transportation to various destinations within and without the state."

It was held that at the time of the accident the deceased was not engaged in interstate commerce. We have already quoted from the case at some length.

See, *accord,* with the *Behrens* case, that there is no such thing as "general work" of switching, and that switching is not an indivisible task but a series of individual tasks, each having character of its own, the following:

Baldassarre v. Penn. R. Co., supra;
Shauberger v. Erie R. Co., 25 Fed. (2d) 297 (C. C. A. 6th);

Wise v. Lehigh V. R. Co., 43 Fed. (2d) 692 (C. C. A. 2d);
Shanley v. P. & R. R. Co., 221 Fed. 1012;
Hench v. Penn. R. Co., supra;
Meyer's Adm'x. v. C. & O. Ry. Co., 259 S. W. 1027 (Ky.);
Martin v. St. Louis-S. F. Ry. Co., supra.

We do not pause to consider these cases in detail because there are cases, which in the light of the foregoing principles, it will be seen are controlling here.

Erie R. Co. v. Welsh, 242 U. S. 303, 61 L. ed. 319:

The plaintiff was a yard conductor in defendant's Brier Hill Yard. He performed miscellaneous services in the way of shifting cars and breaking up and making up trains, under orders of the yard master, and had to apply frequently to the latter for such orders. He with the yard crew moved an interstate car and a caboose and left the car on a siding. The caboose was then taken a short distance and placed on another siding. The engine then took water and returned to the Brier Hill Yard and slowed down to let Welsh go for further orders, all previous orders having been executed. It was while going for these orders that Welsh was injured. It appears that the orders he would have received would have required him to immediately make up an interstate train. It was held that he was not engaged in interstate commerce, and that "the mere expectation" that presently

he would be called upon to perform interstate work did not bring the case within the federal act.

This case is indistinguishable from the case at bar. See, for examples of cases following the *Welsh* case *Patterson v. Director General of Railroads,* 105 S. E. 746 (S. C.), and *Bishop v. Chic. J. Ry. Co.,* 212 Ill. App. 333.

Minneapolis etc. R. Co. v. Winters, 242 U. S. 353, 61 L. ed. 358:

The facts in this case were agreed. Plaintiff was making repairs upon an engine. This engine "had been used in the hauling of freight trains over defendant's line * * * which freight trains hauled both intrastate and interstate commerce, and it was so used after the plaintiff's injury". It will be seen that this statement is a little broader even than the facts in the case at bar. It was shown that it had pulled a freight train into the town where plaintiff was injured, three days before the accident, and pulled one out of the same place on the day of the accident. The court said:

> "That is all we have, and it is not sufficient to bring the case under the act. This is not like the matter of repairs upon a road permanently devoted to commerce among the states. An engine, as such, is not permanently devoted to any kind of traffic, and it does not appear that this engine was destined especially for anything more definite than such business as it might be needed for. It was

not interrupted in an interstate haul to be repaired and go on. It simply had finished some interstate business and had not yet begun upon any other. Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen. At the moment it was not engaged in either. *Its character as an instrument of commerce depended on its employment at the time, not upon remote probabilities or upon accidental later events.*"

The facts in the case at bar are even stronger for than are the facts of the *Winters* case.
the non-application of the Employer's Liability Act

The *Winters* case was followed in the following cases:

Industrial Acc. Com'n. v. Davis, supra;

B. & O. R. Co. v. Branson, 242 U. S. 624, 61 L. ed. 534;

Chicago etc. Co. v. Kindlesparker, 246 U. S. 658, 62 L. ed. 925;

Central R. Co. of N. J. v. Paslick, 239 Fed. 713 (C. C. A. 2d);

O'Dell v. So. Ry. Co., 248 Fed. 343 and 248 Fed. 345, aff'd 252 Fed. 540 (C. C. A. 4th);

Davis v. B. & O. R. Co., 10 Fed. (2d) 140 (C. C. A. 6th).

CASES FOLLOWING THE RULE OF THE WELSH AND WINTERS CASES AND SUPPORTING THE PROPOSITION THAT THE ENGINE HERE WAS NOT AN INSTRUMENTALITY IN INTERSTATE COMMERCE.

The cases on the proposition that engines and cars are or are not at a particular time instrumentalities of interstate commerce are legion. It would serve no useful purpose to attempt to cite them all. We do, however, want to call attention to other cases which are of particular significance because of the similarity in facts.

In *Hines v. Industrial Acc. Com'n,* 184 Cal. 1, cert. den. 254 U. S. 655, 65 L. ed. 459, *sub nom Payne v. Industrial Acc. Com'n,* the California Industrial Accident Commission had made an award in favor of the heirs of one Brizzolara. It was contended that the Commission was without jurisdiction because the injury was received while the employee was engaged in interstate commerce. Brizzolara was a machinist's helper, "engaged in making repairs upon a switch engine, which had been temporarily withdrawn from service therefor". When in service this switch engine was used in both interstate and intrastate traffic. Brizzolara, at the time he was killed, was engaged in adjusting brakes on the engine. It was held that he was not engaged in interstate commerce, and the award was affirmed. The significance of the case lies in the fact that by overruling an earlier California case it brings the California cases in harmony with the *Welsh* and *Winters* cases. The dissenting opinion pointed out that the United States Supreme Court

had denied a petition for a writ of certiorari in the case overruled by the *Hines* case. It is significant, therefore, that in the *Hines* case itself, a petition for a writ of certiorari was denied.

In *Onley v. Lehigh V. R. Co.,* 36 Fed. (2d) 705 (C. C. A. 2d), cert. den. 281 U. S. 743, 74 L. ed. 1156, plaintiff, a brakeman, was working on a switching crew. After returning from his luncheon he was told to oil an engine, and was then directed to take the engine to a track and test the fire hose with which it was equipped. The engine was placed as ordered, and while the hose was being tested it burst, and plaintiff was injured. The sole defense was that plaintiff was not engaged in interstate commerce. "All the record shows concerning the character of his employment as being interstate or otherwise, is in a concession to the effect that both he and the engine had been engaged during the morning in interstate switching part of the time, and in intrastate switching part of the time, and that, but for the accident, the plaintiff would have worked during the afternoon at such switching as might have been required." The court held that plaintiff was not engaged in interstate commerce, and said:

> "The future is barren of assistance, for he was not employed in preparing for some definite movement, so that his work was a necessary incident of it, and became of like character with it; and nothing is known but that the plaintiff, and we may assume the engine, would have, in the ordinary course of events, done such switching

> as would have been required. We do not know what would have been required, except that it might have been wholly interstate switching, wholly intrastate, or partly both."

This of course fits our case. The court then looks to the past, and says:

> "We find nothing to indicate that any operation of the morning's interstate or intrastate switching was unfinished when the plaintiff stopped for lunch."

In our case it definitely appears that the morning shift was completed.

> "His next work in oiling the engine is as devoid of significance, in and of itself, as is testing the fire hose. (The court then points that, in any event, oiling had been completed.) The hose testing was a detached and isolated piece of work. * * * On the contrary, the fact that all previous work had been completed, and no particular work was contemplated, gave rise to the opportunity for taking time to test the hose, and it became a separate and distinct part of the day's work. * * *"

In *Chicago A. R. Co. v. Allen,* 249 Fed. 280 (C. C. A. 7th), cert. den. 246 U. S. 666, 62 L. ed. 929, the plaintiff was injured while working on one of defendant's engines. It was stipulated that this engine "had for a long time been used by it indiscriminately in both interstate and intrastate commerce", and that at the time of injury it was "intended by said defend-

ant to be used thereafter in interstate and intrastate commerce as occasion might require". It was held that plaintiff was not engaged in interstate commerce, the court following the *Winters* case and distinguishing *Pedersen v. Delaware etc. R.,* 229 U. S. 146, 57 L. ed. 1125, upon the ground that the bridge there involved, having once been dedicated to interstate commerce it was permanently so dedicated.

Giovio v. N. Y. C. R. Co., 162 N. Y. Supp. 1026, aff'd 223 N. Y. 653, 119 N. E. 1044. Action for the death of one Giovio. Immediately before the accident he had been coaling a switch engine which was used solely within the yard in switching cars engaged in interstate as well as intrastate commerce, and was so used indiscriminately. On the day of the accident it was used only in moving interstate cars and was so used on the following day. Before the accident the switch engine having finished its work for the day, dumped its fire in an ash pit, took water and proceeded to the coal chute to obtain coal. Deceased stood on the tender of the engine while it was taking coal. As soon as the coaling was finished the hostler started the engine toward the roundhouse, stopped for a minute and deceased attempted to alight. The hostler did not stop to see if he had alighted safely, but started again, and he was killed. Plaintiffs had a verdict. Judgment was reversed upon the ground that the deceased was not, at the time, engaged in interstate commerce. To the argument that the engine, before the accident, had been engaged in interstate

commerce, the court cited and followed the *Winters* case.

Accord,

Leslie v. Long Island R. Co., 224 N. Y. Supp. 737, aff'd 248 N. Y. 511, 162 N. E. 505.

Gray v. Chicago & N. W. Ry. Co., 142 N. W. 505 (Wis.), aff'd 237 U. S. 399, 59 L. ed. 1018. A hostler whose duty it was to service and supply engines was struck while walking through the yard of defendant. It was held that he was not engaged in interstate commerce, and the court said:

> "Taking care of an engine after it has completed its run, and preparing it for the roundhouse, seems very like repairing it, and we have just held that a servant is not employed in interstate commerce who is simply repairing an appliance which may be used for either kind of commerce, but which is not at the time of the repair in actual use in facilitating interstate commerce."

See, *accord,* and following the *Davis, Winters* and *Hines* cases:

James v. Chicago & N. W. Ry. Co., 211 N. W. 1003 (Neb.);

Kasulka v. L. & N. R. Co., 105 So. 187 (Ala.);

Payne v. Wynne, supra;

Connolly v. Chicago etc. Ry. Co., 3 Fed. (2d) 818;

Utah R. T. Co. v. Ind. Com'n., 204 Pac. 87 (Utah).

La Casse v. New Orleans etc. Co., 64 So. 1012 (La.). Here deceased was employed in defendant's roundhouse in receiving locomotives that came in, taking care of them, having them filled with water and steamed up ready for use. He was steaming up an oil burning locomotive when the crown sheet gave way and he was killed. The testimony as to this particular engine was, that it worked all the way between Houston and New Orleans; that it ran both ways out of De Quincy, a Louisiana town. The court said:

> "We do not understand this evidence to mean any more than that this locomotive, like any other locomotive of the defendant company, or any of its cars, might be and was sometimes used in interstate commerce."

The court then referred to two United States Supreme Court cases, and went on:

> "In those cases, although the connection was but slight, there was a direct engagement in interstate commerce, whereas a locomotive or an empty car, which has completed an intrastate run and may on its next run be used in like manner intrastate, can not be said to be actually engaged in interstate commerce."

See, *accord,*

McBain v. N. P. Ry. Co., 160 Pac. 654 (Mont.);
Chicago etc. Co. v. Ind. Com'n., 123 N. E. 278 (Ill.), cert. den. 250 U. S. 670, 63 L. ed.

> 1199, where deceased was killed while washing out an engine in the roundhouse, where the engine was sometimes used in intrastate commerce and where it had not been assigned to any particular train at the time.

Boals v. Penn. R. Co., 193 App. Div. 347, 183 N. Y. Supp. 915. A roundhouse employee was injured dumping ashes from an engine which had come in hauling an interstate train. The transportation of that train was finished. The engine was not under orders for the next trip. The court said that it could not be said, therefore, that the employee, when injured, was engaged in interstate commerce, relying on the *Behrens* and *Welsh* cases.

Again, in *Conklin v. N. Y. C. R. Co.,* 206 App. Div. 524, 202 N. Y. Supp. 75, aff'd 144 N. E. 895, an engine was used indiscriminately in interstate and intrastate commerce. Its last work before the accident was to haul an interstate train. Plaintiff was injured while working on it in the shop. It was held that the plaintiff was not engaged in interstate commerce, the court saying:

> "The use of an engine indiscriminately for interstate and intrastate commerce does not give character to the engine as an instrumentality of interstate commerce, so that a person injured upon that engine when not engaged in interstate commerce may recover damages under the federal Employer's Liability Act. (Citing the Behrens, Winters, Davis and Shanks cases.)"

Bissett v. Lehigh V. R. Co., 132 Atl. 302 (N. J.) aff'd. 134 Atl. 915, cert. den. 273 U. S. 738, 71 L. ed. 867. A switch engine's pump needed repair, and the crew were directed to place it on the repair track, which was also used for yard purposes. This was done. The deceased then climbed on the engine to make the repairs and while so engaged fell off, was injured and died. The repairs were finished that day by a helper, and the engine put back on the work which had been interrupted by the pump trouble. An award was made under the State Act on the ground that the deceased was engaged in intrastate work. This award was affirmed on the authority of the *Winters* case and New Jersey cases which were cited.

Birmingham Belt R. Co. v. Ellenburg, 104 So. 269 (Ala.), cert. den. 269 U. S. 569, 70 L. ed. 416. Plaintiff was the foreman of a switching crew, which was engaged in switching both interstate and intrastate cars. During the shift the engine became disabled, and the plaintiff and his crew took it to the roundhouse. On completion of the repairs the plaintiff and his crew started back with the engine to finish the work they had stopped. On the way back plaintiff was injured. This happened about an hour and a quarter from the time when the engine first became disabled. The court held that the plaintiff was not injured while engaged in interstate commerce, saying, in following the *Behrens* case:

> "In that case there was a temporary dissociation from interstate commerce. Here there was

a temporary dissociation from commerce of any character. In the Behrens case the engine was hauling cars loaded with intrastate freight, but had a definite assignment to bring back interstate cars. Here the engine was going back to its work of moving interstate and intrastate cars indiscriminately."

In *Patterson v. Director General of Railroads,* 105 S. E. 746 (S. C.) plaintiff was the conductor in charge of a switching crew. He had been switching interstate cars. These movements had been completed, and he had stopped his engine to let a train pass. It was while this train was passing that he was injured. It was held that he was not engaged in interstate commerce.

In *Narey v. Minneapolis etc. R. Co.,* 159 N. W. 230 (Iowa), the plaintiff was working on an engine preparing it for a trip. He was attached to defendant's roundhouse at Marshaltown, Iowa. The defendant was an interstate road, and the engines which operated out of this roundhouse were used in interstate commerce. No showing was made, however, as to what was to be done with engine 446, on which plaintiff was working at the time he was injured. It was held that he had failed to make out a case under the federal act.

With the foregoing cases as to engines should be compared the cases holding that cars, although used from time to time in interstate commerce, are not

instrumentalities in interstate commerce after they have finished one run and before they have started or have been definitely assigned to another interstate run. In *Klar v. Erie R. Co.,* 162 N. E. 793 (Ohio), the court said:

> "The claim that the plaintiff was engaged in interstate commerce must rest upon the theory that, the service of this car next preceding the making of repairs thereon, having been interstate in character, such was the status of the car at the time the repairs were being made. This theory is not supported by the decisions of the Supreme Court of the United States. * * * This car was not devoted solely to interstate purposes. It had been so used, but that use had entirely ceased, and it was placed upon the tracks for further disposition, and during that period, it, of course, was not assigned to any service. The nature of the next or further use of the car was a matter of future determination, controlled, no doubt, by the source of the demand therefor."

See, *accord,* cases of unassigned cars, which were simply awaiting a further assignment and this not by reason of necessity of any repairs:

Schauffell v. Director Gen. R. R., 276 Fed. 115 (C. C. A. 3rd);
Johnson v. S. P. Co., supra;
Carey v. N. Y. C. R. Co., supra;
Wise v. Lehigh V. R. Co., 43 F. (2d) 692 (C. C. A. 2d).

In *Hulse v. Pac. etc. Co.,* 277 Pac. 426 (Idaho), where a section man having finished his use of a motor car was towing it to return it, the court said:

> "The general nature of the employee's duties is not determinative of this question. Inquiry must be directed to the particular employment at the precise time of the accident. * * * The rule appears to be that, when a car or other instrumentality of commerce has completed its interstate business, and has not yet been designated specifically for further interstate business, an employee engaged in switching or otherwise handling it, is not engaged in interstate commerce."

Davis v. B. & O. R. Co., 10 Fed. (2d) 140 (C. C. A. 6th) arrives at the same result where repairs were being made on a car coupler, and the next movement of the car was to be to a point from which it would be used either interstate or intrastate commerce as business might require.

See, *accord,*

Rogers v. Canadian Nat. Ry. Co., 224 N. W. 429 (Mich.);

Hart v. Cent. R. Co., of N. J., 147 Atl. 733 (N. J.);

Price v. Cent. R. Co., of N. J., 123 Atl. 756 (N. J.);

Herzog v. Hines, 112 Atl. 315 (N. J.);

Mayers v. Union R. Co., 100 Atl. 967 (Pa.).

Appellant's citation and quotation of *N. Y. C. R. Co. v. Marcone,* 281 U. S. 345, 74 L. ed. 892, is not helpful. The facts upon which the determination that the engine in question was an instrumentality in interstate commerce was founded are not stated. It is simply stated that the engine was used in hauling interstate trains and was not withdrawn from service. On such statement alone the case is wholly distinguishable. An examination of the report of the opinion of the New Jersey court is no more helpful. It is there said simply that, "He had been told to finish his work on an engine in interstate commerce". 144 Atl. 635.

In *N. Y. C. R. Co. v. Carr, supra,* the accident happened while a member of the crew of an interstate train was cutting two intrastate cars out of that train. There was no question but that the train as a whole was an interstate train, and he was working in connection with that train. The facts have no similarity to those of the case at bar. And, compare, as indicating the limit to which the *Carr* case is confined, *Mayor v. Cent. Vt. Ry. Co., supra.*

Erie R. Co. v. Collins, 253 U. S. 77, 64 L. ed. 790, was a case in which an employee was engaged in a signal tower and water tank of a railroad company, which was used in connection with interstate and intrastate trains. It was, then, a structure permanently devoted to interstate commerce. The accident happened

while the employee was endeavoring to start a gasoline engine used in pumping water into the tank. He was, then, working on an instrumentality permanently devoted to interstate commerce, and the case fell within the rule of *Pedersen v. Delaware etc. Co., supra.* That was a case where the employee was working on a bridge used by interstate trains. *Erie R. Co. v. Szary,* 253 U. S. 86, 64 L. ed. 794, decided the same day as the *Collins* case, simply follows that case where the employee was engaged in working at the "sand house" where sand was prepared and stored for interstate engines.

Erie R. Co. v. Van Buskirk, 228 Fed. 489, 279 Fed. 622, 1 Fed. (2d) 70 (C. C. A. 3d), was appealed three times. The first opinion was rendered in 1915. Considerable water has run under the bridge since then. The leading United States Supreme Court cases were decided after that time. In the first opinion it appears that a hostler was injured. He was injured after he had left a particular engine. The question as to whether or not that engine was an instrumentality in interstate commerce was mildly suggested, but not decided, the court deciding the case for the defendant on a distinct ground. The following is the only discussion of the question, whether or not the engine was an instrumentality in interstate commerce, when in charge of a hostler:

> "*Assuming, for present purposes,* that one engaged in such work was employed in interstate commerce, as contemplated by the act, the

> fact is that the defendant did not meet his death while doing any act in or about the hoisting of an engine."

The word "defendant" is evidently used through an inadvertence, and what is intended is, plaintiff's intestate, or deceased.

On the second appeal it appeared that the engine was a switch engine used indiscriminately in interstate and intrastate commerce, and was turned over to the deceased, "for preparation for further work". Again, the case turned upon whether or not, having left the engine to go elsewhere the deceased was still engaged in interstate commerce. There is no discussion as to whether or not the engine was an instrumentality in interstate commerce. The court said:

> "The engine was admittedly an instrumentality of interstate commerce, and when Van Buskirk took charge of it, to have it supplied with coal, sand, and water, he was engaged in such commerce. The case turns upon whether or not, when he got down from his engine and went over toward the Brown hoist and shanty, he was still engaged in interstate commerce."

The very matter which is in issue here, then, was admitted in the *Van Buskirk* case. The facts which inspired this admission are not shown. But whatever the facts were the point was assumed not decided.

On the third trial it was said that the evidence on this point "is substantially identical" with that on the

earlier trials. The point is again simply assumed on the basis of the earlier opinions. There is not only no independent discussion of the point, there is no discussion of the point at all.

We have been unable to find any such case as "*Southern Ry. Co. v. Peters,* 60 So. 611".

There is, however, a case, *Southern Ry. Co. v. Peters,* 69 So. 611, and we assume this is the case referred to. This case does not assist appellant. The employee there was working on a coal chute used to coal interstate trains. He was, therefore, assigned to an instrumentality permanently devoted to interstate commerce. In this respect the case is like the *Collins* case. But more than that, it appeared "that the next train expected was an interstate one". The holding of the court is expressed as follows:

> "Supplying coal to an engine, by a servant employed to do so, where such engine is attached to, and used in pulling, interstate trains, is as essential commerce as is running or repairing the engine."

In *Salvo v. N. Y. C. R. Co.,* 216 App. Div. 592, 215 N. Y. Supp. 645, the fire box of an engine was being cleaned. It took from twenty to thirty minutes to do this, and when done the engine was immediately returned to its duty. The engine in question was one of seven used principally in interstate commerce. It did not appear what particular service the engine in question was doing on the day of the accident. The

court turns the case on two propositions. It says first: "The engine in this case was no more withdrawn from service than an engine which stops to fill its water tank or which stops to take on coal for fuel, or one whose wheel boxes are greased and inspected while stopping at a station." And if this engine had been engaged in interstate commerce the holding on this ground is understandable. The court further says that the service of the deceased, "was really a plant service", and it likens him to the men in the *Collins* and *Szary* cases. Such a holding is understandable if supported by the facts. But the case goes on:

> "We do not think that whether or not the engine upon which the deceased was employed when he met his death had been assigned immediately to interstate commerce determines the character of his employment."

If this is the real basis of the holding of the case, then, clearly, the case can not be supported. It is in square conflict with the multitude of cases already cited. It is interesting to notice that the New York courts have apparently receded from the position of this case, for in a similar case, although this case was relied upon by the dissent, a contrary result was arrived at. (*Leslie v. Long Is. R. Co.,* 224 N. Y. Supp. 737, aff'd. 162 N. E. 505. And see the other New York cases above.)

CONCLUSION AS TO THIS PHASE OF THE CASE.

It is now respectfully submitted that the proof in this case fails in several important respects. It does not appear that the last work of this engine was not intrastate commerce. The burden of proof is on the plaintiff. It does not appear that the first work done by this engine after the accident was not intrastate commerce. It does appear that this engine had definitely finished its shift, had been left by its crew on the roundhouse receiving track, and had been withdrawn from service until it should be reassigned to some shift. It does not appear that it was assigned to any work, much less interstate work, at the time of the accident. It is, accordingly, respectfully submitted, that at the time of the accident this engine was not an instrumentality in interstate commerce, and plaintiff was not engaged in work so closely related to interstate commerce as to be practically a part of it.

APPELLANT IS ESTOPPED TO ASSERT ANY CLAIM UNDER THE FEDERAL EMPLOYER'S LIABILITY ACT.

After plaintiff's injuries were received he was brought to the Southern Pacific Hospital. While there he had a discussion or a talk with some man from a Mr. Newman's office, who was a claims agent. (R., pp. 38-41.) After that conversation he received a voucher check. (R., pp. 41-42.) Later he received two such other voucher checks. These were offered

and received in evidence as Defendant's Exhibits A, B, and C. (R., pp. 42-43.) The original of these exhibits were ordered certified to this court as part of the record herein. (R., p. 58.) The plaintiff and appellant further testified that he or his wife for him endorsed his name on these voucher checks, and that he received the payments called for by them.

These voucher checks show that they were given and received as compensation to the appellant under the terms of the California Workmen's Compensation Act. Their provisions are plain. If appellant's case fell under the Federal Employer's Liability Act, the state act could have no application. If his case fell under the federal act then the defendant might be under no liability to him at all, for it might appear, as it does appear on this record, that the employer was not guilty of any negligence, that there was no violation of any federal safety statute, or that the employee had been injured as a consequence of a risk which he had assumed. The state act is an insurance act—the employer is liable in any event, and whatever the cause of the injury, if it grew out of the employment, with minor exceptions not now important. It is apparent, then, that if there is a question whether or not a railroad employee comes under the state act or the federal act, and the employer agrees with him that the case falls under the state act, the employer is giving up a position of possibly no liability for one of assured liability. The employee is assured of and receives payments which it might turn out, as it did

here, he would not have been entitled to if the case fell under the federal act.

This is what happened in the instant case. The employee agreed that the case fell under the state act when he accepted these vouchers, and the payment called for by them. When the employer made those payments it changed its position to its prejudice. The employee can not accept the fruits of the state act, and at the same time endeavor to maintain under the federal statute what is in effect a common-law action, with certain modifications by way of curtailing the defenses available to the employer, and in some instances imposing an absolute liability on account of defects in certain appliances.

The receipt and realization of these checks and vouchers was more than a mere waiver or mere election. By reason of the defendant's change of position and the benefit received it operates as an equitable estoppel. But more, the transaction is actually a contract of settlement of the rights of the parties. This is not a case where an unsuccessful appeal to the state act was made. Such a case would be distinguishable. See *Conrad v. Youghiogheny, etc. Co.,* 140 N. E. 482 (Oh. St.), where an administratrix was held not estopped by an adverse finding of the Commission operating under a state act. The court said, however:

> "Had the finding of the commission been in her favor, or *had she accepted compensation under the act, an estoppel would arise,* since she could not thereafter consistently sue on the theory

that the deceased was not covered by the act. *One can not pocket the fruits of the act and later disclaim it.*"

The principles involved are not new. We shall not extend this already somewhat extended brief by detailed discussion of them or citation of the leading cases for the basic principles. We simply call attention to those cases which have applied the principle to injured employees who have accepted compensation under compensation acts of the various states.

Sunlight Coal Co. v. Floyd, 26 S. W. (2d) 530 (Ky.);
The Fred S. Sanders, 212 Fed. 545;
Davis v. H. P. Cummings Const. Co., 129 Atl. 729 (N. H.);
Talge Mahogany Co. v. Burrows, 130 N. E. 865 (Ind.);
Spelman v. Pirie, 233 Ill. App. 6;
Allen v. Am. Mill Co., 209 Ill. App. 73;
Mitchell v. L. & N. R. Co., 194 Ill. App. 77;
Brassell v. Electric W. Co., 145 N. E. 745 (N. Y.);
Nyland v. N. Packing Co., 218 N. W. 869 (N. D.);
Sotonyi v. Detroit City Gas Co., 232 N. W. 201 (Mich.);
Stricklen v. Pearson Const. Co., 169 N. W. 628 (Ia.);
The Princess Sophia, 35 Fed. (2d) 736;
Matheny v. Edwards etc. Co., 39 Fed. (2d) 70 (C. C. A. 9th).

There is nothing in the Federal Employer's Liability Act making inapplicable the principle that an employee may so act in view of state compensation acts as to forego other remedies. The only provision of the act which could have any possible application is § 5 (45 U. S. C., § 55). This invalidates any form of agreement or device by which an employer attempts to avoid liability under the act. But this, it has been definitely established, applies only to agreements or devices which antedate injury. After injury and the definite vesting of the employee's rights, he can deal with those rights as he pleases, and can release them on a consideration. There is no restriction on his power to relinquish these rights after he has been injured.

Patton v. Atchison etc. R. Co., 158 Pac. 576 (Okl.);
Anderson v. Oregon etc. Co., 155 Pac. 446 (Utah);
Panhandle etc. Co. v. Fitts, 188 S. W. 528 (Tex.);
Mitchell v. L. & N. R. Co., supra;
Ballenger v. So. Ry. Co., 90 S. E. 1019 (S. C.);
Kusturin v. Chicago etc. Co., 122 N. E. 512 (Ill.);
Lindsay v. Acme etc. Co., 190 N. W. 275 (Mich.).

The employee can release his rights for a lump sum payment. He could agree to do the same thing in return for a specified number of periodic payments. Those periodic payments can be determined by ref-

erence to a state compensation act. He can release his rights in return for such payment determined by reference to such act. This is what he did here.

Incidentally, it should be pointed out, that the California act is a general statute, all embracive, and that one seeking to avoid its application must affirmatively show an exception. It is not an elective act requiring, first, a showing of an election, to accept its provisions, before it applies. Where it applies it excludes all other remedies.

Helm v. Great Western M. Co., 43 Cal. App. 416 (hearing by Supreme Court denied);
McLain v. Llewellyn Iron Works, 56 Cal. App. 60 (hearing by Supreme Court denied);
DeCarli v. Associated Oil Co., 57 Cal. App. 310;
Lockhart v. S. P. Co., 91 Cal. App. 770;
Sarber v. Aetna etc. Co., 23 Fed. (2d) 434 (C. C. A. 9th).

CONCLUSION.

It is now respectfully submitted that the judgment should be affirmed:

Upon the ground that the plaintiff has failed to show any negligence or the violation of the Boiler Inspection Act, or that there was any proximate causal connection between any assumed negligence or violation of statute and any injury;

Upon the ground that there was no error in striking out the conclusion of the plaintiff;

Upon the ground that the plaintiff was not engaged in interstate commerce, and, consequently, the state compensation act, being a general statute applies; and

Upon the ground that the lower court had no jurisdiction in this: That there was a failure to prove diversity of citizenship (plaintiff's wife testified that in July, 1930, they were living in Oakland, but this is the whole of her testimony, and falls far short of proof that the plaintiff was a resident of California or any state other than Kentucky, at the time the action was commenced); and for the reason that, there being no showing that plaintiff was injured while engaged in interstate commerce, the only other ground upon which a federal jurisdiction could be founded has failed.

The appellant upon whom rests the burden of showing error has failed here to sustain that burden, as he failed to sustain the burden of proof below. The judgment should be affirmed.

Respectfully submitted,

GUY V. SHOUP,
A. B. DUNNE,
DUNNE, DUNNE & COOK,
Attorneys for Appellee.

Dated at San Francisco, California, June 6th, 1931.

No. 6421

IN THE

United States Circuit Court of Appeals

9

FOR THE

NINTH CIRCUIT

J. C. WALTON,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY,
a Corporation,

Appellee,

APPELLANT'S BRIEF.

THOMAS F. McCUE,
1836 Hunter-Dulin Building,
San Francisco, California,
Attorney for Appellant.

Trade Typesetting & Printing Co.
805 Allston Way, Berkeley, Calif.

SUBJECT INDEX

CITATION INDEX

No. 6421

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

J. C. WALTON,
Appellant,

vs.

SOUTHERN PACIFIC COMPANY,
a Corporation,
Appellee,

APPELLANT'S BRIEF.

STATEMENT OF THE CASE.

This action is brought under the Federal Employers' Liability Act for personal injuries received by the appellant while he was employed by the appellee as a hostler's helper in its yards at Colton, California.

On the 25th day of March, 1930, while the appellant was on the top of the dome or oil tank of the

tender of a switch engine supplying fuel oil the hostler who was in charge of the engine left the cab. During this time the engine automatically moved backward causing the appellant to be thrown against the back of the cab of the engine by being struck by the oil beam, or spout, causing appellant's injuries.

The complaint contains two causes of action; one based upon the Federal Employer's Liability Act, and the other upon the violation of the Boiler Inspection Act (R. 1-10).

At the trial of the case the following stipulation was entered into in open court.

> "Mr. DUNNE: If your Honor please, in view of counsel's opening statement we can avoid a lot of trouble and perhaps a lot of documentary evidence by stipulating to certain facts. I will follow counsel's opening statement in offering to stipulate to those facts.
>
> That, in the first place, Colton is a station on the line of the Southern Pacific, and that that station is on a part of the main line of the Southern Pacific, running out of Los Angeles and toward and across the Arizona border. We make no question about that.
>
> Second: That at the station of Colton there is a switch-yard, and that that switch-yard is wholly within the state of California.
>
> Thirdly: That in that switch-yard, and in the normal course of the business of this defendant, switching movements are made which are both interstate and intrastate in character.
>
> Next: That the particular switch-engine in

question was assigned to the Colton yard, and was used indiscriminately, to use counsel's own statement, in interstate and intrastate commerce.

And lastly: That on the day of this accident it had been on the seven o'clock in the morning shift; that that shift terminated at three o'clock in the afternoon normally, but there was a little bit of overtime carrying that particular time to 3:10 or 3:15; at any rate, that shift had been completed, the switching crew had brought the engine in and placed it on the roundhouse receiving track, and had left it and the hostler had taken charge of it." (R. 28-29)

"Mr. DUNNE: Yes, we will add that to the stipulation, that on the morning of March 25, 1930, the day of the accident, this locomotive, 2604 was engaged from 7 A. M. until a little after 3 in the afternoon in doing switching operations in the Colton yard and that on that day, and in the course of those switching operations was handling indiscrimately interstate and intrastate commerce, that is, one job, which was one and then it would do another job, which was the other. Now, do you want it as to what happened after the accident?

Mr. McCUE: The next shift.

Mr. DUNN: Now, as to the next shift, I will stipulate to the fact, with the objection that it is immaterial, irrelevant, and incompetent, that on the next shift, from eleven o'clock P. M. on the 25th of March, 1930, until the end of that shift, which would be 7 o'clock A. M. on March 26th, 1930, that locomotive was again engaged in similar service.

Mr. McCUE: With that statement, I do not think it is necessary for you to produce the records and incumber this record.

Mr. DUNNE: We are straight on this, Mr. McCue, that at the time this accident happened, however, the engine had finished its work on the morning shift.

Mr. MCCUE: I thing the evidence clearly shows what took place; that is, as far as shift is concerned, as far as the engine performing any service itself was concerned in the nature of switching that day, when it was turned over to the hostler I apprehend that it had finished its shift.

Mr. DUNNE: That is right.

Mr. MCCUE: With that statement, I waive the production of the car records. I would like to recall Mr. Walton for a few questions I overlooked asking him yesterday."

At the close of the appellant's case the appellee moved for a non suit, which motion was sustained by the Court (R. 55) and judgment was rendered dismissing appellant's cause of action, (R. 25) from which judgment this appeal it taken.

ASSIGNMENT OF ERRORS.

The plaintiff in the above entitled case says there is manifest error in the record herein committed by the trial court and alleges the following as such:

I.

The Court erred in striking out the answer of plaintiff in response to the following questions, to-wit:

"Mr. McCue: Mr. Walton, did you know what the duties of the hostler in the Colton yard were during the period covered by this matter? A. Yes.

Q. You may state what they were.

Mr. Dunne: I make the objection that it calls for the conclusion of the witness and it is without foundation, this man is not a hostler, no foundation is shown.

The Court: I will overrule the objection. Exception.

A. The hostler's duty was to have that engine in charge at all times, have it under his control at all times, sit in the engineer's seat, where he had access to the throttle, the air, and all the manipulations which run in stoping an engine while I was doing my work on the engine, until I got through.

Mr. Dunne: I move to strike that out, your Honor, it is simply an argument from the witness.

The Court: The motion is granted; exception noted." (R. 50)

II.

The Court erred in granting and sustaining the defendant's motion for a nonsuit.

III.

The Court erred in entering judgment dismissing plaintiff's complaint and awarding costs to the defendant. (R. 60-61)

ARGUMENT.

Assignment of Error I.

Walton was asked "did you know what the duties of the hostler in the Colton yard were during the period covered by this matter" and he answered "Yes". Then he was asked to state what they were. Objection was made to this question which was overruled by the Court. Thereupon the witness answered "The hostler's duty was to have that engine in charge at all times, have it under his control at all times, sit in the engineer's seat, where he had access to the throttle, the air, and all the manipulations which run in stopping an engine while I was doing my work on the engine, until I got through." The counsel for appellant moved to strike the answer out on the grounds that there was an argument from the witness. The motion was granted and exceptions noted. (R. 50)

Just what theory the court had for this ruling is beyond our comprehension. The evidence showed that Walton was a hostler's assistant; that he had worked in the yards with the hostler for a considerable length of time and that prior to his entering the duties of assistant hostler he was in the yards doing general work in connection with the round house and engines. He stated that he knew what the duties of a hostler were and he was a competent witness. The testimony was very material in determining whether or not the hostler was negligent in leaving his post of duty in the engine cab at the throttle and leaving the engine unattended.

Moore vs. Grand Trunk Ry. Co., (Vt.) 108 Att. 334.

No argument is necessary to convince this Court that the testimony was proper and that it was error for the Court to strike it from the records. The ground of the motion to strike this evidence was, "it was an argument from the witness" (R. 50). On the contrary, the evidence was a clear statement of fact as to what were the duties of a hostler, by one who knew the duties of a hostler.

Common knowledge dictates that a locomotive engine, under steam, is a dangerous instrumentality when uncontrolled; that when the hostler left it, unattended in such condition that it "kicked back" of its own violation, his act was an act of gross negligence. Walton's statement of the duties of a hostler at the time and place of the accident, seems to be a common sense rule. Since his evidence in this respect was not impeached by any fact in the case, it was competent and material; the court was in error in striking it from the record.

Section 1870 of the California Code of Civil Procedure among other things provides.

> "One who is skilled in a trade or occupation may not only testify as to facts, but are sometimes permitted to give their opinions as experts."

Vallejo R. R. Co. vs. Reed Orchard Co., 169 Cal. 570.

The duties of the hostler are either regulated by rule or by practice and custom, consequently, Walton being familiar with the rule and custom of the yard was a competent witness to testify to what the duties of the hostler were and the striking out of this evidence was clear error.

Assignment of Errors II and III.

We will present the questions arising under these assignments under one head.

The two questions involved under these assignments are—

(a) Does the stipulation set out in the statement of facts in this brief show that the switch engine at the time that plaintiff was injured thereon was an instrumentality of interstate commerce?

(b) Was there sufficient evidence to go to the jury on the question of the violation of the Boiler Inspection Act?

Taking up the first question the stipulation specifically states "that the particular switch engine in question was assigned to the Colton yard and was used indiscriminately, to use counsel's own statement, in interstate and intrastate commerce."

It seems to us that the stipulation forecloses any question as to the switch engine being engaged

in interstate commerce at the time the appellant was injured. It stipulates that the engine was assigned to the Colton yard and that it was used indiscriminately in the switching of both kinds of commerce. An engine when it is once assigned to a class of commerce remains in that class until it is taken out of the assignment.

> "The engine, No. 3835, on which deceased last worked was used in hauling interstate trains. It was not withdrawn from service. See *Walsh vs. N. Y., N. H. & H. R. R. Co.,* 233 U. S. 1; *Erie Railroad vs. Szary,* 253 U. S. 86; cf; *Industrial Commission vs. Davis,* 259 U. S. 182. But petitioner contends that deceased, having finished his work, was no longer employed in interstate commerce. The trial court submitted to the jury the question whether deceased had finished his work on this engine at the time of the accident, and there was some evidence to support a finding that he had not finished it. But if we assume that he had completed the work a few minutes before his death, he was still on duty. His presence on the premises was so closely associated with his employment in interstate commerce as to be an incident of it and to entitle him to the benefit of the Employers' Liability Act. *Erie Railroad vs. Szary, supra; Erie Railroad Co. vs. Winfield,* 244 U. S. 170, 173; see *North Carolina R. R. Co. vs. Zachary,* 232 U. S. 248, 260, *Hoyer vs. Central Railroad Co. of New Jersey,* 255 Fed. 493, 496, 497.
>
> *N. Y. Central Ry. Co. vs. Marcone,* 181 U. S. 345, 50 S. Ct. 29."

The stipulation stipulates the fact that the shift for which the engine was being prepared by Wal-

ton commenced at 11 o'clock P. M. on March 25, 1930, the day that Walton was injured, and the end of that shift was 7 o'clock A. M. the following morning, March 26, 1930; that during that shift the locomotive was engaged in similar service. Not only does the stipulation say that the engine in question, being No. 2604, was regularly assigned to the Colton yard, where it switched indiscriminately both characters of commerce, but it also stipulates the fact that the very shift for which the appellant was preparing said engine was the switching of both kinds of commerce, which brings the engine clearly and beyond any question as being a locomotive engaged in interstate commerce.

In the case of *Erie R. Co. vs. Van Buskirk,* 1 F. (2nd) 70, the court said:

> "The facts relating to the nature of the employment of Van Buskirk, the description of the location, and the manner in which the accident occurred have been so fully stated in the opinions on the prior writs of error (see *Erie Railroad vs. Van Buskirk,* 228 Fed. 489, 143 C. C. A. 71, and *Van Buskirk vs. Erie Railroad Co.* (C. C. A.) 279 Fed. 622) that a detailed restatement would be superfluous. Evidence upon the prior trials was held sufficient to show that the engine under Van Buskirk's charge as hostler was an instrumentality of interstate commerce, being employed indiscriminately in shifting cars used in interstate and intrastate commerce, and that his employment in taking charge of the shifting engine in the interval between the completion of one day's work and the beginning of another day's work, in taking it to the ash pit to be cleaned

> of ashes and supplied with coal, and taking it to the respective points for its supply of sand and water, was employment in interstate commerce."

The Supreme Court in the case of *N. Y. Central R. R. vs. Carr,* 238 U. S. page 260 of the opinion said:

> "But the matter is not to be decided by considering the physical position of the employee at the moment of injury. If he is hurt in the course of his employment while going to a car to perform an interstate duty; or if he is injured while preparing an engine for an interstate trip he is entitled to the benefits of the Federal Act, although the accident occurred prior to the actual coupling of the engine to the interstate cars. *St. Louis &c. Ry. vs. Seale,* 229 U. S. 156; *North Carolina R. R. vs. Zachary,* 232 U. S. 248. This case is within the principle of those two decisions

A switch engine assigned to a terminal yard and which switches indiscriminately interstate and intrastate commerce is engaged in interstate commerce.

> "The engine was admittedly an instrumentality of interstate commerce, and when Van Buskirk took charge of it, to have it supplied with coal, sand and water, he was engaged in interstate commerce. *Pederson vs. Delaware, Lackawanna & Western Railroad Company,* 229 U. S. 146, 33 S. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914 C. 153; *Erie Railroad Co. vs. Winfield,* 244 U. S. 170, 37 S. Ct. 556, 61 L. Ed. 1057."

Van Buskirk vs. Erie Ry. Co., 279 F. 624.

Under the settled law, engine No. 2604 upon which appellant was injured was engaged in interstate commerce at the time of his injuries. It had been assigned as a switch engine at the Colton yard. At the time of plaintiff's injuries, he was preparing it for the next shift. The service as stipulated it was to perform was a *similar service* to what it had performed on the day of the injury. Which makes the case a stronger one than the Van Buskirk case. There is no authority to the contrary.

N. Y. Cent. Ry. Co. vs. Marcone;
Erie Ry. Co. vs. Collins; and
Erie Ry. Co. vs. Szary, supra, as well as the *Van Buskirk case*

are decisive of the case upon the question that Walton was engaged in interstate commerce at the time of his injuries. The proof of the fact was by stipulation, which leaves no chance for controversy. Consequently, as a matter of law, the appellant was engaged in interstate commerce at the time of his injury.

Th engine being assigned to yard work where it switched and handled indiscriminately both intrastate and interstate commerce, it was an instrumentality of interstate commerce.

Salvo vs. N. Y. C. Ry. Co., 216 App. Div. 592, 215 N. Y. 645;
N. Y. C. Ry. Co. vs. Carr, 238 U. S, 260, 35 S. Ct. 780;
Southern Ry. Co. vs. Peters, 60 S. 611, 194 Ala. 780.

In the lower court counsel for appellee pressed the contention that because engine No. 2604 was not actually engaged in interstate commerce at the moment of the injury that the Federal Employers' Liability Act did not apply and he succeeded in convincing the Court of the correctness of his contention.

Probably one of the earliest cases incidentally involving the question is the case of *Illinois Central R. R. vs. Behrens,* 233 U. S. 473, decided in 1914. The Supreme Court in its opinion at page 477 stated:

> "Considering the status of the railroad as a highway for both interstate and intrastate commerce, the interdependence of the two classes of traffic in point of movement and safety, the practical difficulty in separating or dividing the general work of the switching crew, and the nature and extent of the power confided to Congress by the commerce clause of the Constitution, we entertain no doubt that the liability of the carrier for injuries suffered by a member of the crew in the course of its general work was subject to regulation by Congress, whether the particular service being performed at the time of the injury, isolatedly considered, was in interstate or intrastate commerce."

It will be noted that the Court in the above entitled case held that the plaintiff could not recover because at the time of the injury he was engaged in moving several cars all loaded with intrastate freight from one part of the city to another and

that it was not a service of interstate commerce and that the injury resulting in death was not within the statute. (P. 478)

Again referring to the quotation above, the Court said:

> "We entertain no doubt that the liability of the carrier for injuries suffered by a member of the crew in the course of its general work was subject to regulation by Congress."

Upon a cursory reading of this case the conclusion may be drawn that the case is against the position we take, but upon a proper construction the demarkation is quite clear as it is plain that the Supreme Court held that if the injury occurred while the crew was in the course of its general work the statute would apply, but when the crew was engaged in moving interstate cars that the moving of such interstate cars was in no way involved with interstate commerce. When we apply the case to the facts in the instant case we will find that the appellant when injured was engaged in the course of his *general work* in preparing an instrumentality which was at the time actually in interstate commerce and for the express purpose of preparing that instrumentality, the engine, for a continuation of service that was in both intra and interstate commerce. Then when we apply the later decisions heretofore quoted that an engine when assigned to a particular kind of commerce remains in such service until it is withdrawn, as held in

N. Y. Central Railroad Co. vs. Marcone, supra, and the holding in the Van Buskirk case and the cases cited.

In the Behrens case, the Supreme Court citing from *Pedersen vs. Delaware, Lackawanna & Western Railroad Co.,* 229 U. S. 146, said:

> "The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?"

Then applying the laws laid down in the Behrens case to the effect that when the crew was engaged in its *general work* for the switching both intra and interstate cars, the statute would apply, and on the other hand, when the crew was enaged in a specific service that dealt solely with the handling of intrastate cars, the statute did not apply.

The instrumentality here were cars in intrastate commerce that were being moved. Consequently, we must distinguish the difference between an instrumentality which was being actually prepared for service in interstate commerce, and shifting of cars which are not a part of interstate commerce, and though it would appear that the demarkation drawn by the Supreme Court in this case is rather close, yet the distinction is clearly shown, and the Behrens case instead of being an authority against us is an authority in favor of our contention.

In the Behrens case, the cars that were being moved by the engine upon which Behrens was killed,

were not moved in an ordinary switching operation, on the contrary, they were being hauled from one part of the City of New Orleans to another part of that city. It must be assumed from what the Court said, that there was evidence in the case showing that "the course of the general work" of the switching crew was confined to switching operations in the yards of the company. Had Behrens been killed while his engine was engaged in performing the *"general work"* of switching, through the negligence of the defendant, the action would have been within the statute. But when he was enaged in moving intrastate cars to another part of the city, he was outside of the general work of a switching crew; therefore, he was performing a service distinct and separate from switching operations which was merely in intrastate commerce.

The holding of the Supreme Court in this case is that a switch engine which switches indiscriminately interstate and intrastate commerce is an instrumentality of interstate commerce, and that a crew while performing such service is engaged in interstate commerce.

Under all the cases holding, that in order to recover under the statute the injured person must have, at the time of the injury, been engaged in interstate commerce, when properly construed and analyzed, it will be seen that there is no case that holds that when an employee is injured while in the course of his general work in preparing an instrumentality of interstate commerce that he cannot re-

cover, and the law as laid down in the cases that we have cited, seems to us to be so clear, and the further fact that the later cases of the Supreme Court show a trend of lessening the fine points of demarkation where the instrumentality is so closely connected with interstate commerce that there can be no reasonable division made, the statute applies.

DOES THE RECORD SHOW SUFFICIENT EVIDENCE OF THE VIOLATION OF THE BOILER INSPECTION ACT TO CARRY THE CASE TO THE JURY.

A leaky throttle used by an interstate railroad is a violation of the Act.

> Sec. 23, 45 U. S. C. A. 790;
> *Davis vs. Reynolds,* 280 F. 366;
> *Spokane Ry. Co. vs. Campbell,* 217 F. 518; 241 U. S. 497, 36 S. Ct. 683

Under the stipulation appellee is an interstate railroad (R. 28).

That the engine moved automatically or of its own volition, is admitted.

The witness, Orth, an experienced engineer, testified:

> "Such an engine as No. 2604 when the reverse lever is on center and the throttle is shut off or closed, and there is air on it, it would not move of its own volition if on a grade that is .53 of (38) 1% if it had the brakes set. I don't believe it would move if the air was released and the throttle shut off; on such a grade as you

mention. When the engine is standing upon a location similar to that you have described and the throttle is closed that engine would not move backwards so that the spout that goes down into the manhole would be thrown out of place. That engine with the throttle closed and the grade being as you have stated it to be (.53 of 1%) a leaky throttle would cause the engine to move of its own volition.

Q. On such a grade, would you state whether or not the engine would not move of its own volition unless it did have a leaky throttle.

A. Leaky throttle.

Q. That is true is it? A. Yes."

The Witness, Askew, testified:

"Assuming that the throttle and other appurtenances of the engine are in proper working order and the air is off, the engine will not move of its own volition.

If an engine of this character moved backwards, or kicked backwards, I could tell you why it did that. A leaky throttle would be the main thing."

From this evidence as well as the evidence of Walton and the circumstances surrounding the case, the jury could well have drawn the inference that a leaky throttle was the cause of the engine moving automatically.

It must be remembered that this appeal is from a judgment of non-suit.

"Upon a motion for a non-suit it must be assumed that plaintiff is entitled to every fair inference therefrom."

Shandoan vs. C. N. & O. T. P. Ry. Co., 220 F. 68;
Hotel Woodward Co vs. Ford Motor Co., 258 F. 325.

"Every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence deduced, must be considered as facts proven in favor of plaintiff."

"Where the evidence is fairly susceptible of two constructions, or if one of several inferences may reasonably be made, the court must take the one most favorable to plaintiff."

Rabe vs. W. U. Telegraph Co., 198 Cal. 294.

The evidence clearly shows, appellant an able-bodied man of 32 years of age, without any fault of his, was so seriously and permanently injured that he is an invalid and will be crippled for life, by the negligence of and violation of the Boiler Inspection Act by appellee. While the injuries of appellant are not involved upon this appeal, yet, they are proper to be considered as showing a meritorious cause of action, calling for substantial damages, which ought to have appealed to the trial court as warranting a submission of the case to the jury.

The judgment is a miscarriage of justice and the case ought to be reversed.

Respectfully submitted,

THOMAS F. MCCUE,

Attorney for Appellant.

No. 6426

United States

Circuit Court of Appeals

For the Ninth Circuit.

CHIN CHING,

Appellant,

vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco, California,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 6426

United States

Circuit Court of Appeals

For the Ninth Circuit.

CHIN CHING,

Appellant,

vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco, California,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index. Page

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

For Petitioner and Appellant:
STEPHEN M. WHITE, Esq., 576 Sacramento St., San Francisco, Calif.

For Respondent and Appellee:
UNITED STATES ATTORNEY, San Francisco, Calif.

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 20,399–K.

In the Matter of CHIN CHING, on Habeas Corpus —No. 29202/4–4, ex SS. "PRESIDENT MADISON," May 28, 1930.

PETITION FOR WRIT OF HABEAS CORPUS.

To the Honorable, the Southern Division of the United States District Court, for the Northern District of California:

The petition of Chin Kim respectfully shows:

I.

That he is a Chinese person who was born in the United States and subject to the jurisdiction thereof.

II.

That he has resided continuously in the United

States ever since his birth, save for the following trips to China: departed in November, 1905, and returned in January, 1907; departed in June, 1908, and returned in January, 1909; departed in April, 1912, and returned in November, 1913; departed in February, 1917, and returned in April, 1920; departed in April, 1925, and returned in October, 1928; that on each occasion of his departure from, beginning in November, 1905, and return to the United States, the said Chin Kim was examined by the United States Immigration authorities and, as a result, it was found and decided that he was a native-born citizen of the United States by virtue of having proved on each of said occasions that he was born in the United States and subject to the jurisdiction thereof. [1*]

III.

That, while in China between the years 1908 and 1909, he married his second wife, a Chinese by the name of Lee Shee; that, on April 22, 1909, in China, there was born to him and to his said wife a son by the name of Chin Ching.

IV.

That on the 28th day of May, 1930, the said Chin Ching arrived in the Port of San Francisco, California, and, thereupon, applied to the United States Immigration authorities for admission into the United States; that his application for admission was based upon the ground that he is a citizen

*Page-number appearing at the foot of page of original certified Transcript of Record.

of the United States, in that he is the foreign-born son of a native-born citizen of the United States (Section 1993 of Revised Statutes).

V.

That the application for admission of the said Chin Ching was heard by a Board of Special Inquiry, which was convened by the Commissioner of Immigration for said port and, as a result, the said Board of Special Inquiry found that Chin Ching was not a citizen of the United States for the reason that he was not the son of his alleged father, who is your petitioner, but that the said Board of Special Inquiry found and conceded that the alleged father was a native-born citizen of the United States; that an appeal was taken from the decision of the Board of Special Inquiry to the Secretary of Labor with the result that the Secretary of Labor affirmed the excluding decision of the Board of Special Inquiry and ordered the said Chin Ching deported to China.

VI.

That the said Chin Ching is now in the custody of John D. Nagle, as Commissioner of Immigration for the Port of San Francisco, at Angel Island, County of Marin, State and Northern District of California, Southern Division thereof, and the said John D. Nagle, acting under the orders of the Secretary of Labor, has given notice [2] of his intention to deport the said Chin Ching to China on the SS. "President Jackson," which sails from the Port of San Francisco, California, on the 24th day of October, 1930.

VII.

That the Board of Special Inquiry and the Secretary of Labor, in excluding him from admission into the United States and in holding him in custody so that his deportation may be effected, are acting in excess of the authority and power committed to them by the statutes in such cases made and provided for and are unlawfully confining, imprisoning and restraining the said Chin Ching, hereinafter referred to as the "detained" in each of the following particulars, to wit:

1. That, at the hearing before the Board of Special Inquiry, there was introduced, as a witness in behalf of the detained, one Chin Kim, who is the alleged father of the detained and the petitioner herein; that the said Chin Kim testified in agreement with the detained as to the following matters and things: that the father of the detained is named Chin Kim, that he is also known as Chin Ying Lin, that he is 55 years old, that he was born in San Francisco, that he is a laundryman by occupation, that he was last in China between the years 1925 and 1928; that the father of the detained has been married twice, that his first wife was named Louie Shee, that she died in China in 1908, that he had no children by his wife, Louie Shee, but that he and Louie Shee adopted a son by the name of Chin Bock, who applied for admission to the United States in 1921, who was deported from the United States, who died in China in 1922 and who was buried in a hill located about one li (about ⅓ of mile) in back of Ung Sing village, China; that the

father of the detained married his second wife, Lee Shee, in China in 1908, that they were married at San Yuen village, Sun Ming District, China, the native village of Lee Shee; that Lee Shee is 39 years old, that she [3] has natural feet and that she is living at Ung Sing village, Sun Ning District, China; that the father of the detained has had five sons by his wife, Lee Shee, that these sons are: Chin Ching, 21 years old, who is the detained; Chin Sam, 18 years old, Chin Git, 11 years old, Chin Ng, 6 years old, Chin May, 4 years old, that all of these sons were born at Ung Sing village and all, except the detained, are living there with their mother; that the paternal grandfather of the detained was named Chin Guey Yee, that he died at San Francisco in May, 1929, and that he is buried in San Francisco; that the paternal grandmother of the detained is named Yee Shee, that she is 87 or 88 years old and that she is living at Sacramento, California; that the detained has never seen either of his paternal grandparents; that the detained has one paternal uncle, Chin Sing, who is 32 or 33 years old, who is single, who lives in the United States and who has never been to China; that the detained has no paternal aunts; that the maternal grandfather of the detained is named Lee You Choon, that he resides in Mexico; that the maternal grandmother of the detained was named Wong Shee, that she died 2 or 3 years ago at San Yuen village, China; that the detained has one maternal uncle, Lee Sing, who is living in Mexico; that Ung Sing village, where the detained was born

and has lived, contains 16 dwellings, which are arranged in four rows with four houses to each row, and one schoolhouse which stands by itself at the west end of the village, that the villages faces south; that an adobe wall about four feet high extends across the rear and on the east and west sides of the village, that there is no wall in front of the village, that the country in front of the village is used for growing rice, that there is no fish-pond in the village, that there is a gateway at each of the east and west sides, that the gateways are not arched on top, that the gateways are not locked at night, that the toilet houses, about 16 in number, are located inside of the east wall, that these houses are made of [4] adobe, that these houses have roofs; that water for household purposes is obtained from a well located a short distance in front of the schoolhouse, that there is only one well in the village; that all the houses in the several rows of the village touch each other; that there is no ancestral hall in the village, that the nearest ancestral hall is located at Sun Ning City, which is about 12 or 13 lis (about 4 miles) east of Ung Sing village; that the schoolhouse in the village is about one-half the size of a regular dwelling, that it is made of brick, that it has dirt floors, that it has one outside entrance, that the school is called Ung Sing, that the name of the school appears over the entrance in Chinese characters "Ung Singja Sit," that when the detained's father arrived home in 1925, the detained and his brothers, Chin Sam and Chin Git, were attending this school, that the de-

tained never attended school with his deceased adopted brother, Chin Bock, that the village schoolteacher was named Chin Kee, that he is about 50-odd years old, that he came from Ow Sam village, which is about 20 lis (about 7 miles) distant from Ung Sing village, that he slept at the schoolhouse, that school was held six days a week, that the school hours were from 8 A. M. to 12 M. and with an hour for lunch and from 1 P. M. to 5 P. M., that the detained always came home for his lunch; that the detained's house is the second in the second row counting from the east of the village, that it is one story, that it is made of brick, that it contains five rooms, which are: two bedrooms, two kitchens and a parlor, that it has dirt floors throughout, that it has an open court, which is paved with brick, that it has no outside windows, that it has two outside entrances, the large door of which opens to the east and the small door of which opens to the west, that each bedroom has a double skylight, that each kitchen has a single skylight, that there is a loft in each bedroom and a shrine loft in the parlor, that all of the lofts are attached to the rear wall of the several rooms, that both of the kitchens are [5] used for cooking, that each kitchen has a stationary stove, which is made of brick, that the stoves have no chimneys, that fuel is stored in the kitchens, that the stoves are attached to the wall between the bedrooms and kitchens; that when the detained's father was last in China between 1925 and 1928, the detained's father, his wife and their two youngest sons, Chin Ng and Chin May, slept in the bed-

room on the west side of the house and that the three oldest sons, including the detained, slept in the bedroom on the east side; that when the detained's father was last in China, he remained at all times in Ung Sing village, except that in the latter part of 1927 he made a trip, alone, to Hongkong on which he remained three or four days; that the nearest market to Ung Sing village is called Sam Gop Market, that it is about 8 lis (about 3 miles) east of Ung Sing village, that when the detained's father was last in China, he frequently visited this market, that he made his headquarters at Wing Kee Company in this market, that he occasionally took the detained with him on trips to the market; that Ai Gong Market is located about 3 pos (about 10 miles) from Ung Sing village, that when the detained's father was last in China, he occasionally visited this market but that he never took the detained with him; that when the detained's father was last in China, he, in company with the detained and with his two youngest sons, Chin Sam and Chin Git, visited the grave of his deceased adopted son, Chin Bock, during the Ching Ming Festival of 1926, 1927 and 1928, that the grave of this adopted son *is marked* by any stone or tablet; that there is a small stream of water located about five or six lis (about 2 miles) from Ung Sing village to the west, that this stream is not navigable; that Chin Ai Lee, who died about 6 or 7 years ago, lived in the house opposite the large door of the detained's house, that this house is now occupied by Chin Ai Lee's wife and his

mother, who is past 60, that Chin Ai Lee had no children; that Chin Ai Moon, about 40 years old, a [6] farmer, lived with his wife and son, Chin Foo, about 12 years old, in the house opposite the small door side of the detained's house; that Chin Ai Git, about 40 years old, a farmer, lived with his wife and son, Chin Yow, about 6 years old, and his daughter, Chin Ngew, about 15 years old, in the house immediately in front of the detained's house; that Chin Ying, about 50 years old, a farmer, lived with his wife and son, Chin On, about 20 years old, in the house immediately to the rear of the detained's house; that the detained has written many letters to his father since the latter's return to the United States in 1928, that the detained's father has several of these letters in his possession; that the detained's father left Ung Sing village to return to the United States in September, 1928, that immediately before commencing his journey to the United States he bade his family goodbye at his house, that the detained helped him to carry his baggage as far as Sai Ning Railway Station, where he took a train at about 10 o'clock A. M.; that a village known as Lower Ung Sing village is located about one-half a li (about 1/6 of mile) west of the detained's native village of Ung Sing, that Lower Ung Sing village has 50 or 60 houses, that it is not surrounded by a wall, but that it is surrounded by bamboo trees; that Yung Shee Yuen village is located about 3 lis (about one mile) in front of the detained's village, that Yung Shee Yuen village is inhabited by Lew family people; that Kee Lung

village is located about 8 lis north (about 3 miles) of the detained's village, that it is occupied by Toy family people.

2. That, at the hearing before the Board of Special Inquiry, there was, also, introduced, as a witness in behalf of the detained, one Lew Yew; that the said Lew Yew testified as follows; that he is 40 years old, that he was born at Lung Wan village, Sun Ning District, China, that he first came to the United States in 1909, that he was last in China between 1928 and 1929, that he first became acquainted with Chin*a* Kim, the alleged father of the detained, about 6 or 7 years [7] ago at the Now Fong Company, San Francisco, California, that, in 1928, when he was about to depart from the United States for a visit to China, Chin Kim entrusted him with $50.00 U. S. currency and with a letter to deliver to his (Chin Kim's) family at Ung Sing village, China, that he took this letter and money and delivered the same to Chin Kim's wife, Lee Shee, at Ung Sing village, China, in November, 1928, that on this occasion Lee Shee introduced the detained to him as her son and as the son of Chin Kim, that he again visited Lee Shee and her family at Ung Sing village, China, in September, 1929, for the purpose of ascertaining whether or not she or any of the members of her family had a message to be delivered to to Chin Kim in the United States.

3. That, at the hearing before the Board of Special Inquiry, there were introduced in evidence all the immigration records relating to Chin Kim,

the alleged father of the detained; that these records disclose that the said Chin Kim has made sworn statements to the immigration authorities claiming to have a son, who bears the same name as the detained and who was born on the same date as claimed for the birth date of the detained, on the following occasions: in April, 1912, incident to his departure from the United States for China; in November, 1915, incident to his return from China; in February, 1917, incident to his departure from the United States for China; in April, 1920, incident to his return from China; in 1921, incident to the application for admission to the United States of his adopted son, Chin Bock; in April, 1925, incident to his departure from the United States for China; in October, 1928, incident to his return from China.

4. That, at the hearing before the Board of Special Inquiry, the detained personally identified the said Chin Kim, his alleged father, as his father, and the said Chin Kim personally identified the detained as his son. [8]

5. That, at the hearing before the Board of Special Inquiry, the detained personally identified his witness, Lew Yew, as the person whom he met in his home in 1928 and 1929 and the said Lew Yew personally identified the detained as the person to whom he was introduced in the home of Chin Kim as the son of Chin Kim and the latter's wife, Lee Shee.

6. That the detained speaks the same dialect, namely, See Yip of the Sun Ning District, of the

Chinese language as is spoken by Chin Kim, his alleged father.

That your petitioner alleges that the fact that Chin Kim, the alleged father of the detained, and the detained have testified in agreement upon every matter of family history, of family relations, of the principal and minor events of family life, as to the description of the village in China where the detained was born and has lived, as to the conditions in the village, as to the description of the family home, the fact that the said Chin Kim was in China at a time to render possible his paternity to the detained, having been in China from June, 1908, until January, 1909, and the detained having been born on April 22, 1909, the fact that there was mutual identification between the said Chin Kim and the detained, the fact that the witness, Lew Yew, has visited the home of Chin Kim and there met the detained; the fact that the detained speaks the same dialect of the Chinese language as the said Chin Kim, established to a resonable certainty that the relationship of father and son exists between the said Chin Kim and the detained; that the said immigration authorities, in finding that the said relationship has not been established, have rejected the evidence aforesaid and have thereby acted arbitrarily and manifestly unfair and have, as a result, denied the detained the full and fair hearing to which he was and is entitled.

7. That the said immigration authorities, in denying the [9] existence of the relationship of father and son between the alleged father, Chin

Kim, and the detained, have urged certain testimonial discrepancies, which are disclosed in the findings of the Board of Special Inquiry, which findings are filed herewith under Exhibit "A," which exhibit is hereby expressly referred to and made a part of this petition with the same force and effect as if set forth in full herein; that your petitioner alleges that the claimed testimonial discrepancies, as urged by the Board of Special Inquiry, are not unreasonable, but that the same are the probable result of honest mistake, rather than deliberate error or falsehood, as disclosed by the brief of Washington counsel, which brief was filed in behalf of the detained before the Secretary of Labor and a copy of which brief is filed herewith under Exhibit "B" and is hereby expressly referred to and made a part of this petition with the same force and effect as if set forth in full herein; that the said immigration authorities, in denying the existence of the claimed relationship upon so-called testimonial discrepancies, which are not unreasonable or which do not show that the witnesses have given false testimony, but which discrepancies are subject to a reasonable explanation, as disclosed by the brief filed herewith, have acted manifestly unfair and have denied the detained the full and fair hearing to which he was and is entitled.

VIII.

That the detained is in detention, as aforesaid, and for said reason is unable to verify this petition; that your petitioner, in behalf of the detained

and in his own behalf, verifies this petition, but for and as the act of the detained.

WHEREFORE, your petitioner prays that a writ of habeas corpus issue herein as prayed for, directed to the said Commissioner, commanding and directing him to hold the body of the said detained [10] within the jurisdiction of this Court, and to present the body of the said detained before this Court at a time and place to be specified in said order, together with the time and cause of his detention, so that the same may be inquired into to the end that the said detained may be restored to his liberty and go hence without day.

Dated at San Francisco, California, October 23d, 1930.

STEPHEN M. WHITE,
Attorney for Petitioner. [11]

United States of America,
State of California,
City and County of San Francisco,—ss.

Chin Kim, being first duly sworn, deposes and states as follows:

That he is the petitioner named in the foregoing petition; that the petition has been read and explained to him and that he knows the contents thereof; that the same is true of his own knowledge, except those matters stated therein on information and belief and, as to those matters, he believes it to be true.

CHAN KIM.

Subscribed and sworn to before me this 23d day of October, 1930.

[Seal] STEPHEN M. WHITE,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Oct. 23, 1930. [12]

[Title of Court and Cause.]

ORDER TO SHOW CAUSE.

Good cause appearing therefor, and upon reading the verified petition on file herein:

IT IS HEREBY ORDERED that John D. Nagle, Commissioner of Immigration for the Port of San Francisco, appear before this Court on the 17th day of November, 1930, at the hour of 10 o'clock A. M. of said day, to show cause, if any he has, why a writ of habeas corpus should not be issued herein, as prayed for, and that a copy of this order be served upon the said Commissioner, and a copy of the petition and said order be served upon the United States Attorney for this District, his representative herein.

AND IT IS FURTHER ORDERED that the said John D. Nagle, Commissioner of Immigration, as aforesaid, or whoever, acting under the orders of the said Commissioner, or the Secretary of Labor, shall have the custody of the said Chin Ching, or the master of any steamer upon which he may have been placed for deportation by the said Commis-

sioner, are hereby ordered and directed to retain the said Chin Ching, within the custody of the said Commissioner of Immigration, and within the jurisdiction of this court until its further order herein.

Dated at San Francisco, California, October 23d, 1930.

FRANK H. NORCROSS,
United States District Judge.

[Endorsed]: Filed Oct. 23, 1930. [13]

EXHIBIT "A."

20,399–K.

FINDINGS AND DECISION OF BOARD OF SPECIAL INQUIRY.

By CHAIRMAN:

CHIN CHING (JUNG), *alias* CHIN MOON WAI, is applying for admission to the U. S. as the son of CHIN KIM, *alias* CHIN YING LIM.

Applicant states he is 22 years of age, Chinese reckoning, born ST. 1–3–3 (April 22, 1909), in the UNG SING VILLAGE, S.N.D., China. He appears to be about the age claimed.

CHIN KIM was conceded a native by this Service on his return from his first trip to China on which he departed Nov. 4, 1905, "Siberia" and returned February 25, 1907, on the "Mongolia."

CHIN KIM next departed for China June 30, 1908, on the "Mongolia" and returned February 26, 1909, on the "Korea." This trip is the essen-

tial one making paternity possible to a child of the applicant's claimed age.

CHIN KIM again departed for China without preinvestigation, April 24, 1912, on the "Tenyo Maru" and returned on the same vessel December 8, 1913, and first declared that he had a son named CHIN JUNG, born ST. 1–3–3 (April 22, 1909).

Alleged father departed on his 4th trip to China, March 27, 1917, on the SS. "Tjisondari" and returned on the same vessel May 11, 1920, and mentioned Chin Jung, as having been born ST. 2–3–3 (April 12, 1910). On all other occasions thereafter he stated Chin Jung was born ST. 1–3–3.

Chin Kim attempted to bring a boy named CHIN POK (See file No. 20251/6–1) into the U. S. as the son of his first wife. Chin Pok was given a primary inspection and hearing and quite a few discrepancies *appeared the* testimony of himself and alleged father, Chin Kim. He was held for a Board of Special Inquiry and in that hearing Chin Kim claimed Chin Pok was his adopted son. Chin Pok was deported to China and it is said by the applicant and Chin Kim that he died a short time after his return to China.

Chin Kim last returned to China April 18, 1925, on the "President Taft" and returned October 17, 1928, on the "President Grant."

In addition to the alleged father and the applicant a Chinese man named Lee Yew or Lee Ho Shing testified in this case. Lee Yew claims he first met the applicant at his home in Ung Sing Village in CR. 17—latter part of 10th. month (Nov.,

1928), when he delivered $100 Chinese currency and a letter to the home of the applicant, who was home when he called, from Chin Kim in this country. Applicant agrees exactly with Lee Yew as to their first meeting, but stated only delivered $100 Chinese money to his home on that occasion—no letter. Applicant reversed himself today (23d June) and said Lee Yew also delivered a letter to his home on that occasion.

The following discrepancies appear in the record between the applicant and his alleged father and it will be noted that the alleged father on several occasions repudiated his testimony in the case of CHIN POK, who was deported. [14]

Alleged father stated that the applicant and his 2d and 3d sons, Chin Som and Chin Git, all attended the home village school while he was in China on his last visit, and that the latter two sons had started to attend school before he arrived home (p. 5). Applicant (p. 16) stated that Chin Git started to attend school in CR. 17–2d month (about March, 1928). It will be noted alleged father returned to U. S. October 17, 1928.

Alleged father (pg. 6) stated the applicant attended the home village school six (6) days in a week when he was home last.

Applicant (pg. 17) stated that during his father's last visit home he attended school every day—seven (7) days each week.

Alleged father (pg. 3) agrees with applicant that there is an adobe wall, 4 feet high, on both sides and rear of the village, which has been standing there

for 20 or 30 years. In the case of CHIN POK (Primary hearing) the alleged father stated there was no wall at his village and re-affirmed that statement on recall.

In the present testimony the alleged father *stated are* about 16 toilets made of adobe blocks, larger than a brick, located just inside the East wall along the East wall of his village. (See alleged father's diagram, Exhibit "A.")

The applicant (pg. 18) states there are 10 toilets made of brick, the same kind of brick as the dwelling-houses, not of adobe or adobe blocks, at the East end of the village. He drew a diagram placing the East wall between the houses (dwellings) and the toilets, following which he confirmed the location of the toilets outside the wall by a statement to that effect. (See Exhibit "E.")

Both the applicant and the alleged father in their diagram show the location of the only well in their village as in front of the schoolhouse; whereas, the alleged father in the case of CHIN POK (20251/6–1) stated that the only well in his village is located a short distance in front of his row. (See pg. 7 present testimony and pg. 3 Primary hearing, Chin Pok case.)

Alleged father (pg. 7) testified that there is a double skylight in each bedroom of his house in

---

Ung Sing village, and a single skylight in each kitchen, all covered with glass. Applicant (pg. 19) states there are two *skylight* in each bedroom of his father's house and that those skylights are single.

Applicant and alleged father give different locations to their bedrooms when the latter was home on his last visit; but agree as to the persons who slept together.

Alleged father (page 8) stated the house opposite the large door of his house belongs to CHIN AI LEE, who is deceased and was not married, and that that house was occupied by Chin Ai Lee's mother. He was confronted with his statement in the CHIN POK to the effect that Chin Ai Lee and his wife lived in that house and he agreed that Chin Ai Lee was married and that his wife and the mother of Chin Ai Lee were both living in that house when he was home on his last visit. [15]

The applicant (pg. 19) states that the widow of Chin Ai Lee lives in the house opposite their large door; that she was living there alone when his father was last in China; that Chin Ai Lee is dead; he never saw him; never saw his mother and that his mother did not live in that house when his father was last home.

Alleged father (pg. 8) stated that CHIN FOO, 12 years old, lived with his father, Chin Ai Moon, in the house opposite the small door of his house when he was last in China. Applicant agrees to the name of this boy and that he lives in that house, but gives his age as 20 years; further, that he attended school with that boy in the home village. In this connection it will be noted that the father last returned from China about two years ago.

Alleged father shows in his diagram (Ex. "A") that CHIN SING lives in the fourth and last house

in the row in which he lives and that CHIN CHOON lives opposite Chin Sing's house to the West. The applicant shows the locations of their houses in reverse order. The village is claimed to contain but 16 dwellings, 4 houses in each row.

Alleged father (pg. 8) states that both kitchens of his house were used for cooking purposes when he was last home and that there are stationary stoves in each kitchen made of brick, and that both of these stoves are attached to the wall between the bedrooms and the kitchens—both sides the same.

Applicant (pg. 20) stated that both kitchens of his house were used, alternately, for cooking purposes when his father was last home; that the stationary stoves in these kitchens are made of brick; that the stove on the large door kitchen is along the North wall, while the stove on the small door kitchen is along the South wall. According to their testimony the village faces South. Applicant states the kitchens are at the front of his father's house.

Alleged father states applicant never attended school with CHIN POK in the home village. Applicant states he attended school with CHIN POK for 2 or 3 years in the village school (pg. 8 and 16).

Alleged father (pg. 9) states that he has a wooden tablet, which he prepared for himself and wife, not opened but covered with a piece of cloth, on the shrine shelf of his home in China.

Applicant (pg. 20) states there are no wooden tablets on the shrine shelf in his father's house; that there is no such tablet on that shelf to cover his

father and mother, but that there is a piece of paper with writings on it to serve that purpose, and that he would know if there was a wooden tablet in his home to commemorate his parents tho it might be covered up.

A single full length photograph, purporting to be that of the applicant, was submitted by the attorney of record. Applicant was questioned (pages 21 and 23) concerning this photo at first stating he was never taken in a group with any members of his family or anyone else. It was pointed out to him that another person appeared to be sitting in a chair, the sleeve of a Chinese blouse showing on the left margin of the photo., and the applicant admitted he was photographed with Chin On, a neighbor, but believed his father only wanted to see his photograph and not the photograph of a friend. [16]

Other discrepancies appear in the record of this applicant which will no doubt have an adverse bearing on the case.

In view of the discrepancies listed above I am not satisfied that the applicant is the natural *bona fide* son of CHIN KIM, *alias* CHIN YING LIM, nor that the burden of proof as required by Section 23 of the Act of 1924 has been sustained and I move that the applicant be denied admission to the United States and deported to China the country whence he came.

By Member KELLY.—I second the motion.

By Member AABEL.—I concur. [17]

SUMMARY.

By CHAIRMAN:

In compliance with Bureau telegram, under date of August 28th, 1930, a Board of Special Inquiry reconvened for the purpose of receiving testimony of an additional witness named LIM WING, *alias* LIM YIP LOOK. The testimony of this additional witness was received as well as some additional testimony from the applicant and his alleged father. It is claimed by the applicant and the alleged father that LIM WING made his initial visit to their home about CR. 16–11 or 12 (About December, 1927, or January, 1928) when the latter first met and was introduced to the applicant. The purpose of this visit was to deliver $50.00 in Chinese currency. The alleged father and the additional witness and applicant agree that the additional witness made another visit in CR. 17–1 for the purpose of making a new year's call. The applicant and the additional witness claim the latter made five more visits to the applicant's home, each time delivering the exact sum of $50.00. It is further claimed that LIM WING was associated in business in the LOON HING LUNG COMPANY at UNG YICK CITY where the alleged father sent money allotments to his home to be delivered. The applicant, on page 33, states that he has never been in LIM WING'S store in GUNG YING CITY and, therefore, has never seen him there. LIM WING, on page 40, claims the applicant had visited his store in CR. 17–5 (about June or July, 1928), met

him there alone and engaged in conversation with him for about half an hour. On page 41, he reversed himself and stated that the applicant had never visited his store in GUNG YICK MARKET, that he meant the applicant's father had visited him [18] there and had misunderstood me. LIM WING stated he conducted the LOON HING LUNG CO., GUNG YICK CITY, which dealt in Chinaware, with a friend of his, named LIM BON, as copartner. This store, he stated, was founded in CR. 17–2 (March, 1928) after he had gone to China and that the firm was not in existence before that time; further that after he had arrived home his partner got him interested in it and they started this firm together, and it was given the name of LOON HING LUNG CO. by his partner. This store, he states, was located on SOO HONG STREET, in GUNG YICK CITY. It is observed that LIM WING, when preinvestigated on Nov. 16, 1927, incident to his last trip to China, stated his address in China would be "LUEN HING LUNG CO., SOO HONG ST., GUNG YICK CITY." He was asked to explain why he had given that address, if the firm was not in existence prior to the time of his arrival in China. He hesitated for a considerable length of time and made no reply. It will be further observed in LIM WING'S testimony that he, during his residence in this country, was engaged in the occupation of laundryman and dishwasher and had never engaged in business.

LIM WING stated that the allotments of CHIN KIM to his family in China were sent to his store

(Lim Wing's) in Gung Yick City to be delivered by him and he personally made those deliveries at the different time he had stated.

CHIN KIM was last in China from CR. 14 (1925), about May, until about Sept., 1929. In the present instance he stated that prior to CR. 14 (1925) (page 36) he had been sending money home thru a good friend of his *name* CHIN WING of the WING KEE COMPANY, SAM GOP MARKET. On page 5, of the original hearing, he stated he made his headquarters in that store when last in China and gave the distance of that market from his village as "about 8 lis East." He admits that he took that business away from a friend and member of his own clan family and entrusted his allotments of money to his family in China to LIM WING, a man of another clan family, who was doing business in Gung Yick City (about 2 pos away from his village) for delivery to his home.

LIM WING (page 40, at bottom) stated he delivered money to quite a few families of residents of this country, naming the families of LIM YIP PUEY and LIM YIP CHAY. His family history sheet in file No. 29457/6–25 shows him to have visited but one, the family of Chin Gim, at Ung Sing Village, SND. He was asked why he did not mention at that time the visits to the homes of Lim Yip Puey and Lim Yip Chay and he replied that he had visited so many parties that he didn't have time to name all of them. A little further on (page 41) I asked him how he came to single out Chin Kim's

family as the only one he had visited and delivered money to when interrogated at the time of his arrival in the U. S. and he said he just happened to remember this party because Chin Kim's mother had told him that her son had gone to the U. S.

All of the above points working together and considered in relation to each other indicate that it is highly probably that LIM WING was not associated in business in the LOON HING LUNG CO., GUNG YICK CITY; that CHIN KIM did not entrust his money allotments home to LIM WING thru that firm, as it would be inconsistent for him to transfer his business from a friend and clansman, in whose store he made his headquarters nearer his home and give it to a man of another clan. It is obvious that the alleged meetings of LIM WING were prepared for the occasion.

On pages 34 and 35 of the record the applicant and his alleged father grasped the opportunity to iron out the discrepancies in their former testimony, but in the opinion of the board the changes advanced by these two principals deserve to be rejected as of little or no weight. This Board takes the stand that the discrepancies, in their entirety, carry just as much weight to-day as they did at the [19] original hearing. CHIN GIM (KIM) alleged father executed an affidavit (with his photo attached) before a notary public, John F. Burns, under date of Sept. 10, 1930, which sets forth that he made certain discrepancies in his previous testimony given at the original hearing on the application of his son, Chin Ching, for admission to the

U. S. which he desires to correct. This affidavit is marked Exhibit "G," incorporated in and made a part of the record in this case. It is noted in the next to last paragraph of this document that Chin Gim relates that he had no knowledge of the mistake mentioned therein (relation to his previous testimony) until so informed by his attorney. . . . . It is the belief of this Board that Chin Kim and the applicant truly described in the first instance the matters on which they were at variance and are now seeking to cover up and minimize them. The applicant claims to be 22 years of age (Chinese) and to have lived in Ung Sing Village, a village of but 16 dwellings. The alleged father claims he spent over three (3) years in that village from about May, 1925, to about September, 1928. Both the applicant and his alleged father should be held fully responsible for their original statements.

I am of the opinion that the testimony given by the applicant, his alleged father and the additional witness, LIM WING, on reopening has not to any appreciable extent helped the case of this applicant, and as previously stated I am of the opinion that the discrepancies between the applicant and his alleged father developed in the original hearing have fully as much weight to-day at the time of the applicant's exclusion by the previous Board.

In view of the foregoing, I reaffirm *by* motion of June 23, 1930, to exclude the applicant admission to the United States and recommend his deportation to China the country whence he came.

By Member McNAMARRA.—I second the motion.

By Member AABEL.—I concur.

[Endorsed]: Filed Oct. 23, 1930 [20]

[Title of Court and Cause.]

NOTICE OF FILING OF FINDINGS AND DECISION OF SECRETARY OF LABOR.

To JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco, Respondent Herein, and to GEORGE J. HATFIELD, United States Attorney, His Attorney:

You and each of you will please take notice that the petitioner herein files herewith under Exhibit "C," as part and parcel of his petition for a writ of habeas corpus and with the same force and effect as if set forth in full in said petition, a copy of the findings and decision of the Secretary of Labor, through his Board of Review, denying the application for admission to the United States of the detained herein.

Dated this 31st day of January, 1931.

STEPHEN M. WHITE,
Attorney for Petitioner. [21]

EXHIBIT "C."

FINDINGS AND DECISION OF SECRETARY OF LABOR, THROUGH HIS BOARD OF REVIEW.

No. 55733/122. San Francisco. August 22, 1930.

In re: CHIN CHING, age 21.

This case comes before the Board of Review on appeal from a decision of a Board of Special Inquiry at the port denying admission as the son of a native citizen of the United States. The citizenship of the alleged father being conceded, the question at issue is relationship.

Attorney Roger O'Donnell has presented oral argument and filed a brief. Attorney W. H. Wilkinson at the port.

The record shows that the alleged father was in China at a time to make possible his paternity to a child of the applicant's asserted age and that in 1913 he claimed to have a son of this applicant's description. It also shows that in 1921 this alleged father attempted to bring into the United States one Chin Pok as his son whose birth year was given as 1906. When confronted with his testimony in 1907, that he had no children, the alleged father said that Chin Pok was an adopted son. Chin Pok was excluded and, his appeal being dismissed by the Department, deported.

The alleged father who was last in China in 1928, and an alleged acquaintance, who claims to have

met the applicant in 1929, appeared to testify. The testimony shows such discrepancies as the following:

The applicant and his alleged father now agree that there is an adobe wall four feet high about three sides of the home village which the alleged father says has *been twenty* or thirty years. But the alleged father's 1921 record shows that he then testified that there was no wall about his village. Similarly while the applicant and his alleged father now agree that the only well in the village is near the school at the tail of the village in 1921, the alleged father said that the only well in his village was located in front of his row near the other end of his village. The attorney attempts to minimize the damaging force of these discrepancies by saying that whereas the alleged father has been at home for three years, 1925–1928, since 1921, he had been at home only occasionally before 1921, but his record shows that he was in China on four visits prior to 1921 and that the last of them, 1917–1920, was a three year visit.

The alleged father says that all of his three oldest sons were attending school when he went home in 1925 and that none of them started to go to school while he was there. The applicant says that one of these three was not attending school when his father came home and did start in March, 1928. Also while the alleged father says that his son who the applicant claims to be attended school only six days a week when he (the alleged father) was at home last, the applicant declares that he attended school every day, seven days a week. [22]

No. 55733/122.

The alleged father says that his village has sixteen toilets which are located inside the village wall. The applicant says that his village has ten toilets which are located outside the wall of his village. The disagreement is confirmed in diagram approved as correct by the alleged father and the applicant, respectively.

The alleged father says that the widow and mother of a deceased neighbor were living in the house next to his own when he was last in China. The applicant says that the house next to his was occupied by one woman living alone when his father was last at home. The father gives the age of an occupant of the house next door on the other side as twelve whereas the applicant gives that person's age at twenty.

The alleged father testifies that the applicant and Chin Pok, the deportee referred to above, never attended school together in the home village. The applicant testifies that he and Chin Pok attended school together in the home village for two or three years.

In view of the appearance of such discrepancies, which could not reasonably be expected to appear in a *bona fide* case, it is not thought that the evidence reasonably established this *applicant* claim to be the son of his alleged father.

It is recommended that the appeal be dismissed.

L. PAUL WINNINGS,

Chairman, Secy. & Commr. Genl's Board of Review.

NJW.

So ordered.

W. W. SMELSER,
Assistant to the Secretary. [23]

No. 55733/122. San Francisco. October 20, 1930.
In re: CHIN CHING, age 21.

The appeal from a decision of a Board of Special Inquiry denying admission to this applicant as the son of a man conceded to be a native of the United States was dismissed on August 22, 1930, because the claimed relationship was found not to have been reasonably established. On August 26, 1930, the case was reopened to hear an additional witness.

Attorney Roger O'Donnell has again presented oral argument and has filed a supplementary brief. Attorney W. H. Wilkinson at the port.

This additional witness says that he was introduced to the applicant by the latter's alleged father in China in 1928 and that he has seen the applicant a number of times since that introduction. In this man the testimony of the alleged father and the applicant agrees regarding this matter with that which this witness gives. But, even though discrepancies such as the witness' saying that he participated in the founding of a firm in March, 1928, which before that had neither existence or name, whereas in November, 1927, prior to his departure from the United States he named that firm as his "headquarters" in China, he overlooked, and the testimony of this witness be regarded as favorable to the applicant's claim, it cannot be held to be of sufficient weight to offset the adverse features, the discrep-

ancies between the testimony of the applicant and that of his alleged father and the discrepancies between the alleged father's present and former testimony, which cause the applicant's rejection and the dismissal of his appeal.

Both the alleged father and the applicant have taken advantage of the reopening to change their testimony regarding a number of matters about which their original statements conflict, as follows:

The alleged father originally testified that all of his three oldest sons were attending school when he went home in 1925 and that none of them started to go to school while he was there between 1925 and 1928, whereas the applicant originally stated that one of these three, namely, Chin Git, had not started to go to school before his father came home in 1925, but did start to go to school in 1928. On September 10, 1930, after the dismissal of the appeal and the order reopening the case had been issued, the alleged father executed an affidavit wherein he says that Chin Git started to go to school in 1927, and explains: "This mistake on affiant's part having occurred through his momentary failure to realize the difference in ages between his second and third sons." This seems to be an indication, almost an admission, that this alleged father was testifying from a fabricated scheme concerning a concocted family for certainly if he were testifying according to the facts, his statement that Chin Git was going to school when he reached home in 1925 and from there until 1927 would have been based on his direct knowledge of what Chin Git was doing

if, as claimed, he and that boy were living in the same house, and would not depend on his realizing or remembering the difference between the stated ages of his second and third sons. [24]

No. 55733/122.

An outstanding discrepancy in the original testimony was that whereas the alleged father testified, and confirmed in a diagram of his village, that the toilet houses in his village are located inside the village wall and are sixteen in number, the applicant testified, and confirmed in his diagram, that the toilet houses are located outside the village wall and number ten. Now the alleged father volunteers the statement that the toilet houses are outside the wall and alleged that the reason for his previous "mistake" was that he had forgotten their location. In view of the fact that he was in China for three years on his last visit and returned only two years ago, it is scarcely credible that he should have forgotten whether or not he had to go around through a gateway or climbed over a wall in order to make use of the village toilet facilities. The testimony is also brought into a*g*rument concerning the number of toilet houses; that applicant now saying that there are fifteen or sixteen. If this is true, it is not seen why he should, as he did, describe and picture them as precisely ten in number. As to the material of which these buildings are constructed the alleged father quite definitely described that material as not brick but adobe, and the applicant definitely stated that the building is not adobe but

brick. Now each volunteer the statement that the adobe is faced with brick.

Whereas the alleged father originally testified that opposite the large door of his house two women, the widow and the mother of a deceased neighbor lived, the applicant testified that only one woman, the widow, lived there. Now, the applicant says that the mother went away to work but he originally said that he never saw that woman.

The alleged father originally testified that there was a wooden tablet covered with a cloth on the shrine loft of his house, which referred to him and to his wife, while the applicant declared that there was no such tablet there and that if such a tablet were there he would know it. The applicant and the alleged father now volunteer the statement that there is such a tablet there and that it is covered with paper.

But even were all such indications of collusion and fabrication passed over there still remains the serious discrepancies between the present testimony of the alleged father and the testimony he gave in 1921 when he fraudulently attempted to bring into the United States as his blood son one Chin Pok, who, when confronted with a record that showed that he could not be the alleged father's natural son, the alleged father claimed to be an adopted son, and who was excluded and deported.

Those discrepancies, which could not reasonably be expected to appear in the record of a *bona fide*

case, are voted in the memorandum of August 22, 1930.

It is not thought that any evidence has been produced in the re-opened case which warrants a change in the Department's outstanding decision.

It is recommended that the dismissal of the appeal be affirmed.

L. PAUL WINNINGS,
Chairman, Secy. and Comr. Genl's, Board of Review.

EJW.

So ordered.

W. W. SMELSER,
Assistant to the Secretary. [25]

[Endorsed]: Due service and receipt of a copy of the within Exhibit "C" is hereby admitted this 31st day of January, 1931.

GEO. J. HATFIELD,
Attorney for Respondent.

Filed Jan. 31, 1931. [26]

[Title of Court and Cause.]

APPEARANCE OF RESPONDENT.

Respondent hereby appears through the undersigned attorney and files herewith in answer to the order to show cause herein, the original certified record of the immigration proceedings relative to

said Chin Ching before the Bureau of Immigration and the Secretary of Labor.

GEO. J. HATFIELD,
United States Attorney,
Attorney for Respondent.

[Endorsed]: Filed Jan. 12, 1931. [27]

[Title of Court and Cause.]

At a stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 12th day of January, in the year of our Lord one thousand nine hundred and thirty-one. Present: The Honorable FRANK H. KERRIGAN, Judge.

MINUTES OF COURT—JANUARY 12, 1931—ORDER RESPECTING INTRODUCTION OF ORIGINAL IMMIGRATION RECORDS.

This matter came on regularly for hearing on order to show cause as to issuance of a writ of habeas corpus. S. M. White, Esq., was present as attorney for petitioner. Wm. A. O'Brien, Esq., Asst. U. S. Attorney, was present for respondent and filed Immigration records as respondent's exhibit. After hearing attorneys, the coutr ORDERED that said matter be and same is hereby submitted on briefs to be filed in 3 and 2 days. [28]

[Title of Court and Cause.]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 17th day of February, in the year of our Lord one thousand nine hundred and thirty-one. Present: The Honorable FRANK H. KERRIGAN, Judge.

MINUTES OF COURT—FEBRUARY 17, 1931—ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS.

IT IS ORDERED that the petition for writ of habeas corpus heretofore submitted herein be, and the same is, hereby denied and the said petition be, and the same is, hereby dismissed. [29]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To the Clerk of the Above-entitled Court, to JOHN D. NAGLE, Commissioner of Immigration, and to GEORGE J. HATFIELD, Esq., United States Attorney, His Attorney:

You and each of you will please take notice that Chin Kim, the petitioner in the above-entitled matter, hereby appeals to the United States Circuit

Court of Appeals for the Ninth Circuit, from the order and judgment rendered, made and entered herein on February 17, 1931, denying the petition for a writ of habeas corpus filed herein.

Dated this 26th day of February, 1931.

STEPHEN M. WHITE,
Attorney for Appellant. [30]

[Title of Court and Cause.]

PETITION FOR APPEAL.

Comes now Chin Kim, the petitioner in the above-entitled matter, through his attorney, Stephen M. White, Esq., and respectfully shows:

That on the 17th day of February, 1931, the above-entitled court made and entered its order denying the petition for a writ of habeas corpus, as prayed for, on file herein, in which said order in the above-entitled cause certain errors were made to the prejudice of the appellant herein, all of which will more fully appear from the assignment of errors filed herewith.

WHEREFORE, the appellant prays that an appeal may be granted in his behalf to the Circuit Court of Appeals of the United States for the Ninth Circuit thereof, for the correction of the errors as complained of, and further, that a transcript of the record, proceedings and papers in the above-entitled cause, as shown by the praecipe, duly authenticated, may be sent and transmitted to the said United States Circuit Court of Ap-

peals for the Ninth Circuit thereof, and further, that the said appellant be held within the jurisdiction of this Court during the pendency of the appeal herein, so that he may be produced in execution of whatever judgment may be finally entered herein.

Dated at San Francisco, California, February 26, 1931.

STEPHEN M. WHITE,
Attorney for Appellant. [31]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes the appellant, Chin Ching, through his attorney, Stephen M. White, Esq., and sets forth the errors he claims the above-entitled court committed in denying his petition for a writ of habeas corpus, as follows:

I.

That the court erred in not granting the writ of habeas corpus and discharging the appellant, Chin Ching, from the custody and control of John D. Nagle, Commissioner of Immigration at the Port of San Francisco.

II.

That the court erred in not holding that it had jurisdiction to issue the writ of habeas corpus as prayed for in the petition on file herein.

III.

That the court erred in not holding that the allegations set forth in the petition for a writ of habeas corpus were sufficient in law to justify the granting and issuing of a writ of habeas corpus. [32]

IV.

That the Court erred in holding that the claimed discrepancies in the testimony, as a result of the evidence adduced before the immigration authorities, were sufficient, in law, to justify the conclusion of the immigration authorities that the claimed relationship between the alleged father of appellant and appellant did not exist.

V.

That the Court erred in not holding that the claimed discrepancies in the testimony, as a result of the evidence adduced before the immigration authorities, were not sufficient in law, to justify the conclusion of the immigration authorities that the claimed relationship between the alleged father of appellant and appellant did not exist.

VI.

That the Court erred in holding that the claimed discrepancies, or any of them, in the testimony, as a result of the evidence adduced before the immigration authorities, were not subject to a reasonable explanation and reconcilable.

VII.

That the Court erred in not holding that any and

all of the claimed discrepancies in the testimony, as a result of the evidence adduced before the immigration authorities, were subject to a reasonable explanation and reconcilable.

VIII.

That the Court erred in holding that the evidence adduced before the immigration authorities was not sufficient, in kind and character, to warrant a finding by the immigration authorities that the claimed relationship between the alleged father of appellant and appellant existed. [33]

IX.

That the Court erred in not holding that the evidence adduced before the immigration authorities was sufficient, in kind and character, to warrant a finding by the immigration authorities that the claimed relationship between the alleged father of appellant and appellant existed.

X.

That the Court erred in holding that there was substantial evidence before the immigration authorities to justify the conclusion that the claimed relationship between the alleged father of the appellant and the appellant did not exist.

XI.

That the Court erred in not holding that there was no substantial evidence before the immigration authorities to justify the conclusion that the claimed relationship between the alleged father of the appellant and the appellant did not exist.

XII.

That the Court erred in holding that the appellant was accorded a full and fair hearing before the immigration authorities.

XIII.

That the Court erred in not holding that the appellant was not accorded a full and fair hearing before the immigration authorities.

WHEREFORE, appellant prays that the said order and judgment of the United States District Court for the Northern District of California made, given and entered herein in the office of the Clerk of said Court on the 17th day of February, 1931, denying the petition for a writ of habeas corpus, be reversed and that he be restored to his liberty and go hence without day.

Dated at San Francisco, California, February 26, 1931.

STEPHEN M. WHITE,
Attorney for Appellant. [34]

[Endorsed]: Due service and receipt of a copy of the within notice of appeal, etc., is hereby admitted this 26th day of February, 1931.

GEORGE J. HATFIELD,
United States Attorney,
Attorneys for Appellee.

Filed Feb. 26, 1931. [35]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

It appearing to the above-entitled court that Chin Kim, the petitioner herein, has this day filed and presented to the above Court his petition praying for an order of this Court allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and order of this Court denying a writ of habeas corpus herein and dismissing his petition for said writ, and good cause appearing therefor,—

IT IS HEREBY ORDERED that an appeal be and the same is hereby allowed as prayed for herein; and

IT IS HEREBY FURTHER ORDERED that the Clerk of the above-entitled court make and prepare a transcript of all the papers, proceedings and records in the above-entitled matter and transmit the same to the United States Circuit Court of Appeals for the Ninth Circuit within the time allowed by law; and

IT IS FURTHER ORDERED that the execution of the warrant of deportation of said Chin Ching, be and the same is hereby stayed pending this appeal and that the said Chin Ching, be not removed from the jurisdiction of this court pending this appeal.

Dated at San Francisco, California, February 26, 1931.

FRANK H. KERRIGAN,
United States District Judge. [36]

[Endorsed]: Due service and receipt of a copy of the within order allowing appeal is hereby admitted this 26th day of February, 1931.

GEORGE J. HATFIELD,
United States Attorney,
Attorneys for Appellee.

Filed Feb. 26, 1931. [37]

[Title of Court and Cause.]

ORDER TRANSMITTING ORIGINAL EXHIBITS.

Good cause appearing therefor, It IS HEREBY ORDERED that the Immigration Records filed as exhibits herein, may be transmitted by the Clerk of the above-entitled court to and filed with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit to be taken as a part of the record on appeal in the above-entitled cause with the same force and effect as if embodied in the transcript of record and so certified by the Clerk of this court.

Dated this 26th day of February, 1931.

FRANK H. KERRIGAN,
United States District Judge.

[Endorsed]: Due service and receipt of a copy of the within order transmitting original exhibits

is hereby admitted this 26th day of February, 1931.

GEO. J. HATFIELD,
United States Attorney,
Attorneys for Appellee.

Filed Feb. 26, 1931. [38]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of Said Court:

Sir: Please issue copies of following papers for transcript on appeal:

1. Petition for writ of habeas corpus.
2. Order to show cause.
3. Appearance of respondent.
4. Exhibit "A"—findings and decision of Board of Special Inquiry.
5. Notice of filing of findings and decision of Secretary of Labor.
6. Exhibit "C"—findings and decision of Secretary of Labor.
7. Minute order respecting introduction of original immigration records.
8. Minute order denying petition for writ of habeas corpus.
9. Notice of appeal.
10. Petition for appeal.
11. Assignment of errors.
12. Order allowing appeal.

13. Order transmitting original immigration records. [39]
14. Praecipe.

STEPHEN M. WHITE,
Attorney for Appellant.

[Endorsed]: Filed Mar. 14, 1931. [40]

[Title of Court.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 40 pages, numbered from 1 to 40, inclusive, contain a full, true, and correct transcript of the records and proceedings in the Matter of Chin Ching, on Habeas Corpus, No. 20,399–K, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Fourteen Dollars and Five Cents ($14.05) and that the said amount has been paid to me by the attorney for the appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 21st day of March, A. D. 1931.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk. [41]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States, to JOHN D. NAGLE, Commissioner of Immigration, Port of San Francisco, and GEORGE J. HATFIELD, United States Attorney, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, State of California, within 30 days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Northern District of California, wherein Chin Ching is appellant and you are appellee, to show cause, if any, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable FRANK H. KERRIGAN, United States District Judge for the Southern Division of the Northern District of California, this 26th day of February, 1931.

FRANK H. KERRIGAN,
United States District Judge. [42]

Due service and receipt of a copy of the within citation on appeal is hereby admitted this 26th day of February, 1931.

GEO. J. HATFIELD.
GEORGE J. HATFIELD,
United States Attorney,
Attorneys for Appellee.

Filed Feb. 26, 1931. [43]

[Endorsed]: No. 6426. United States Circuit Court of Appeals for the Ninth Circuit. Chin Ching, Appellant, vs. John D. Nagle, as Commissioner of Immigration for the Port of San Francisco, California, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed March 28, 1931.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6426

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHIN CHING,

Appellant,

vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco, California,

Appellee.

BRIEF FOR APPELLANT.

STEPHEN M. WHITE,
576 Sacramento Street, San Francisco,
Attorney for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

No. 6426

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHIN CHING,

Appellant,

vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco, California,

Appellee.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This appeal is taken from the order of the District Court for the Northern District of California denying a petition for a writ of habeas corpus. (Tr. of R. p. 38.)

The appellant is a Chinese person who was born in China on April 22, 1909. He arrived in the Port of San Francisco on May 28, 1930, and, thereupon, applied to the immigration authorities for admission to the United States, claiming that he was a citizen thereof by virtue of the American nativity and citizenship of his father, Chin Kim. (Section 1993 of Revised Statutes.) A Board of Special Inquiry, which was convened at the port, decided that the appellant was not the son of Chin Kim, his alleged

father, although it conceded that the latter was a native citizen of the United States. An appeal was taken to the Secretary of Labor with the result that the decision of the Board of Special Inquiry was affirmed.

In the Court below, there were filed, as part of the petition, the following exhibits: (1) Exhibit "A"—Findings and Decision of Board of Special Inquiry (Tr. of R. pp. 14-21); Exhibit "C"—Findings and Decision of Secretary of Labor. (Tr. of R. pp. 29-31.) At the hearing of the petition, the original immigration records were filed as part of the petition and these records, by order of the Court below (Tr. of R. p. 45), have been transmitted to this Court.

ARGUMENT

In behalf of the appellant, it is contended that the evidence adduced before the immigration authorities established to a reasonable certainty that he was the son of his alleged father and that, in denying the existence of the claimed relationship, these authorities acted arbitrarily and unfairly.

Ge Lan v. Nagle, 22 Fed. (2d) 246, C. C. A. 9th.;

Gung Fun v. Nagle, 34 Fed. (2d) 845, C. C. A. 9th.;

Hon Chung v. Nagle, 41 Fed. (2d) 123, C. C. A. 9th.;

Nagle v. Jue Sing, 41 Fed. (2d) 822, C. C. A. 9th.;

Louie Poy Hok v. Nagle, No. 6342, decided April 6, 1931, C. C. A. 9th.

Firstly, let us examine the record to ascertain whether or not the alleged father has a son, whom the appellant might be. In this connection, the record shows that the alleged father departed from the United States on his second trip to China on June 30, 1908, and that he returned to this country on February 26, 1909. (Tr. of E. p. 16.) He was, therefore, in China at a time to render possible his paternity to a child, who was born on April 22, 1909, which is the birthdate of the appellant. He departed from the United States on his third trip to China on April 24, 1912, and returned on December 3, 1913. (Tr. of E. p. 17.) Incident to his return on December 3, 1913, he testified before the immigration authorities that he had a son by the name of Chin Jung (Jung is variously pronounced as Ching and Chung and Tung), who was born on the Chinese date of S. T. 3-3-7, which is equivalent to our April 22, 1909. His testimony was as follows:

"Q. How many children have you ever had?

A. Three boys, no girls.

Q. Give name, sex, age, date of birth, and present location of each.

Name	Age	Sex	Birthdate	Location
Chin Park	8	M	K.S. 32-8-15	China
Chin Jung	*5*	*M*	*S.T. 3-3-7*	*China*
Chin Soon	2	M	U.S. 2-4-9	China"

(Respondent's Exhibit "D," p. 29.)

Thereafter, he made trips from the United States to China, as follows: departed on March 27, 1917, and returned on May 11, 1920; departed on April 18, 1925, and returned on October 17, 1925 (Tr. of E. p. 17) and it will not be denied that on the occasion

father, although it conceded that the latter was a native citizen of the United States. An appeal was taken to the Secretary of Labor with the result that the decision of the Board of Special Inquiry was affirmed.

In the Court below, there were filed, as part of the petition, the following exhibits: (1) Exhibit "A"—Findings and Decision of Board of Special Inquiry (Tr. of R. pp. 16-22); Exhibit "C"—Findings and Decision of Secretary of Labor. (Tr. of R. pp. 29-31.) At the hearing of the petition, the original immigration records were filed as part of the petition and these records, by order of the Court below (Tr. of R. p. 45), have been transmitted to this Court.

ARGUMENT.

In behalf of the appellant, it is contended that the evidence adduced before the immigration authorities established to a reasonable certainty that he was the son of his alleged father and that, in denying the existence of the claimed relationship, these authorities acted arbitrarily and unfairly.

Go Lun v. Nagle, 22 Fed. (2d) 246, C. C. A. 9th.;

Gung Yow v. Nagle, 34 Fed. (2d) 848, C. C. A. 9th.;

Hom Chung v. Nagle, 41 Fed. (2d) 126, C. C. A. 9th.;

Nagle v. Jin Suey, 41 Fed. (2d) 522, C. C. A. 9th.;

Louie Poy Hok v. Nagle, No. 6349, decided April 6, 1931, C. C. A. 9th.

Firstly, let us examine the record to ascertain whether or not the alleged father has a son, whom the appellant might be. In this connection, the record shows that the alleged father departed from the United States on his second trip to China on June 30, 1908, and that he returned to this country on February 26, 1909. (Tr. of R. p. 16.) He was, therefore, in China at a time to render possible his paternity to a child, who was born on April 22, 1909, which is the birthdate of the appellant. He departed from the United States on his third trip to China on April 24, 1912, and returned on December 8, 1913. (Tr. of R. p. 17.) Incident to his return on December 8, 1913, he testified before the immigration authorities that he had a son by the name of Chin Jung (Jung is variously pronounced as Ching and Chung and Tung), who was born on the Chinese date of S. T. 1-3-3, which is equivalent to our April 22, 1909. His testimony was as follows:

"Q. How many children have you ever had?

A. Three boys, no girls.

Q. Give name, sex, age, date of birth, and present location of each.

Name	Age	Sex	Birthdate	Location
Chin Park	8	M	K.S. 32-8-15	China
Chin Jung	*5*	*M*	*S.T. 1-3-3*	*China*
Chin Som	1	M	C.R. 2-1-9	China"

(Respondent's Exhibit "D," p. 29.)

Thereafter, he made trips from the United States to China, as follows: departed on March 27, 1917, and returned on May 11, 1920; departed on April 18, 1925, and returned on October 17, 1928 (Tr. of R. p. 17) and it will not be denied that on the occasion

of his departure and return on each of these trips he reiterated his claim to have a son, who bears the name of the appellant and who was born on the same date as the appellant.

We have, therefore, the established fact that the alleged father was in China at a time to render possible his paternity to the appellant and the further fact that he has consistently mentioned over a period of many years a son, who bears the name of the appellant and who was born on the same date as the appellant. Concerning such facts, this Court, in *Louie Poy Hok v. Nagle,* supra, recently said:

> "A similar case arose in Ng Yuk Ming v. Tillinghast, 28 F. (2d) 547, C. C. A. 1. There, 'thirteen years before the father testified before the immigration authorities that he had a son bearing the name of applicant, which he confirmed on every occasion upon which he was called upon to testify.' The decision of the Court was that the decision of the immigration officials was not supported by the evidence and the prisoner was ordered released from custody. See, also, Gung You v. Nagle, 34 Fed. (2d) 848, C. C. A. 9th. In the instant case the cumulative effect of the repeated assertions by the father and the previously entered alleged brothers that there was a third son, Louie Fung Leung, born October 1, 1909, certainly go farther than a mere indication that the three were suffering from a delusion; the effect of the testimony in the mind of any reasonable man must be to create the belief that there was a third son somewhere in the offing."

Secondly, let us consider the testimony to ascertain whether or not the same reasonably establishes that

the appellant is the son, whom the alleged father has consistently mentioned. In this connection, we have, first, the testimony of the appellant and the alleged father, showing that they have testified in agreement as to minute details of a myriad of subjects, as follows: that the father of the appellant is named Chin Kim, that he is also known as Chin Ying Lin, that he is 55 years old, that he was born in San Francisco, that he is a laundryman by occupation, that he was last in China between the years 1925 and 1928; that the father of the appellant has been married twice, that his first wife was named Louie Shee, that she died in China in 1908, that he had no children by his wife, Louie Shee, but that he and Louie Shee adopted a son by the name of Chin Bock, who applied for admission to the United States in 1921, who was deported from the United States, who died in China in 1922 and who was buried in a hill located about one li (about 1/3 of mile) in back of Ung Sing village, China; that the father of the appellant married his second wife, Lee Shee, in China in 1908, that they were married at San Yuen village, Sun Ning District, China, the native village of Lee Shee; that Lee Shee is 39 years old, that she has natural feet and that she is living at Ung Sing village, Sun Ning District, China; that the father of the appellant has had five sons by his wife, Lee Shee, that these sons are: Chin Ching, 21 years old, who is the appellant; Chin Sam, 18 years old, Chin Git, 11 years old, Chin Ng, 6 years old, Chin May, 4 years old, that all of these sons were born at Ung Sing village and all have been living there with their mother; that the paternal grandfather

of the appellant was named Chin Guey Yee, that he died at San Francisco in May, 1929, and that he is buried in San Francisco; that the paternal grandmother of the appellant is named Yee Shee, that she is 87 or 88 years old and that she is living at Sacramento, California; that the appellant has never seen either of his paternal grandparents; that the appellant has one paternal uncle, Chin Sing, who is 32 or 33 years old, who is single, who lives in the United States and who has never been to China; that the appellant has no paternal aunts; that the maternal grandfather of the appellant is named Lee You Choon, that he resides in Mexico; that the maternal grandmother of the appellant was named Wong Shee, that she died 2 or 3 years ago at San Yuen village, China; that the appellant has one maternal uncle, Lee Sing, who is living in Mexico; that Ung Sing village, where the appellant was born and has lived, contains 16 dwellings, which are arranged in four rows with four houses to each row, and one schoolhouse which stands by itself at the west end of the village, that the village faces south; that an adobe wall about four feet high extends across the rear and on the east and west sides of the village, that there is no wall in front of the village, that the country in front of the village is used for growing rice, that there is no fish-pond in the village, that there is a gateway at each of the east and west sides, that the gateways are not arched on top, that the gateways are not locked at night; that water for household purposes is obtained from a well located a short distance in front of the schoolhouse, that there is only one well in the village; that

all the houses in the several rows of the village touch each other; that there is no ancestral hall in the village, that the nearest ancestral hall is located at Sun Ning City, which is about 12 or 13 lis (about 4 miles) east of Ung Sing village; that the schoolhouse in the village is about one-half the size of a regular dwelling, that it is made of brick, that it has dirt floors, that it has one outside entrance, that the school is called Ung Sing, that the name of the school appears over the entrance in Chinese characters "Ung Singja Sit," that when the appellant's father arrived home in 1925, the appellant and his brothers, Chin Sam and Chin Git, were attending this school, that the village school-teacher was named Chin Kee, that he is about 50-odd years old, that he came from Ow Sam village, which is about 20 lis (about 7 miles) distant from Ung Sing village, that he slept at the schoolhouse, that the school hours were from 8 A. M. to 12 M. and with an hour for lunch and from 1 P. M. to 5 P. M., that the appellant always came home for his lunch; that the appellant's house is the second in the second row counting from the east of the village, that it is one story, that it is made of brick, that it contains five rooms, which are: two bedrooms, two kitchens and a parlor, that it has dirt floors throughout, that it has an open court, which is paved with brick, that it has no outside windows, that it has two outside entrances, the large door of which opens to the east and the small door of which opens to the west, that each bedroom has a double skylight, that each kitchen has a single skylight, that there is a loft in each bedroom and a shrine loft in the parlor, that all of the lofts are

attached to the rear wall of the several rooms, that both of the kitchens are used for cooking, that each kitchen has a stationary stove, which is made of brick, that the stoves have no chimneys, that fuel is stored in the kitchens, that the stoves are attached to the wall between the bedrooms and kitchens; that when the appellant's father was last in China between 1925 and 1928, the appellant's father, his wife and their two youngest sons, Chin Ng and Chin May, slept in the bedroom on the west side of the house and that the three oldest sons, including the appellant, slept in the bedroom on the east side; that when the appellant's father was last in China, he remained at all times in Ung Sing village, except that in the latter part of 1927 he made a trip, alone, to Hongkong on which he remained three or four days; that the nearest market to Ung Sing village is called Sam Gop Market, that it is about 8 lis (about 3 miles) east of Ung Sing village, that when the appellant's father was last in China, he frequently visited this market, that he made his headquarters at Wing Kee Company in this market, that he occasionally took the appellant with him on trips to the market; that Ai Gong Market is located about 3 pos (about 10 miles) from Ung Sing village, that when the appellant's father was last in China he occasionally visited this market but that he never took the appellant with him; that when the appellant's father was last in China, he, in company with the appellant and with his two youngest sons, Chin Sam and Chin Git, visited the grave of his deceased adopted son, Chin Bock, during the Ching Ming Festival of 1926, 1927 and 1928, that the grave

of this adopted son is not marked by any stone or tablet; that there is a small stream of water located about five or six lis (about 2 miles) from Ung Sing village to the west, that this stream is not navigable; that Chin Ai Lee, who died about 6 or 7 years ago, lived in the house opposite the large door of the appellant's house, that this house is now occupied by Chin Ai Lee's wife and his mother, who is past 60, that Chin Ai Lee had no children; that Chin Ai Moon, about 40 years old, a farmer, lived with his wife and son, Chin Foo, about 12 years old, in the house opposite the small door side of the appellant's house; that Chin Ai Git, about 40 years old, a farmer, lived with his wife and son, Chin Yow, about 6 years old, and his daughter, Chin Ngew, about 15 years old, in the house immediately in front of the appellant's house; that Chin Ying, about 50 years old, a farmer, lived with his wife and son, Chin On, about 20 years old, in the house immediately to the rear of the appellant's house; that the appellant has written many letters to his father since the latter's return to the United States in 1928, that the appellant's father has several of these letters in his possession; that the appellant's father left Ung Sing village to return to the United States in September, 1928, that immediately before commencing his journey to the United States he bade his family goodbye at his house, that the appellant helped him to carry his baggage as far as Sai Ning Railway Station, where he took a train at about 10 o'clock A. M.; that a village known as Lower Ung Sing village is located about one-half a li (about 1/6 of a mile) west of the appellant's native village of

Ung Sing, that Lower Ung Sing village has 50 or 60 houses, that it is not surrounded by a wall, but that it is surrounded by bamboo trees; that Yung Shee Yuen village is located about 3 lis (about one mile) in front of the appellant's village, that Yung Shee Yuen village is inhabited by Lew family people; that Kee Lung village is located about 8 lis north (about 3 miles) of the appellant's village, that it is occupied by Toy family people. (Respondent's Ex. "A," pp. 9-18, 20-33, 72-78, 75-78; Tr. of R. pp. 4-10.)

In addition to the testimony of the appellant and his alleged father, there is the testimony of an unrelated witness by the name of Lee Yew. This witness claims that, while in China on a recent visit, he called at the home of the appellant in Ung Sing village and there met the appellant and his mother. (Respondent's Exhibit "A," pp. 18-20.) Furthermore, the record shows that this witness, upon his return in October, 1929, from his trip to China, testified before the immigration authorities that he called upon the family of Chin Kim, the appellant's alleged father, and that he had there met the wife and sons of Chin Kim. (Respondent's Exhibit "E," p. 3.) The testimony of this witness, while it does not directly go to the issue of relationship between the appellant and his alleged father, nevertheless, it is, at least, corroborative of the testimony of the appellant and his alleged father as to the place in China where the appellant has resided.

The testimony offered to establish the identity of the appellant as the son, to whom Chin Kim, the

alleged father, has so often alluded in the past, is further supplemented by several letters, which the father exhibited to the Board of Special Inquiry as having been received from the appellant and by an old photograph of the appellant sent by the latter to the father in the year 1922. These letters are contained in respondent's Exhibit "B" and the photograph is contained in a large envelope under the same exhibit. Concerning the photograph, the appellant testified as follows:

> "Q. (Again showing full length photograph presented by the attorney of record, which purports to be that of the applicant.) This photograph I show you—Do you know who possesses this photograph?
>
> A. Yes, my father.
>
> Q. How did that get into your alleged father's hands?
>
> A. Because I sent this photograph to my father in C. R. 11 (1922).
>
> Q. Are you sure that your alleged father did not come into possession of that photograph when he was in China on his last visit from C. R. 14 (1925) to C. R. 17 (1928)?
>
> A. I am sure I sent this picture to my father in C. R. 11 (1922)."
>
> (Respondent's Exhibit "A," pp. 30-31.)

In rejecting the affirmative evidence adduced in support of the claimed relationship, the immigration authorities relied upon certain testimonial discrepancies. We quote the pertinent part of the decision of the Secretary of Labor, as follows:

> "* * * The record shows that the alleged father was in China at a time to make possible

his paternity to a child of the applicant's asserted age and that in 1913 he claimed to have a son of this applicant's description. It also shows that in 1921 this alleged father attempted to bring into the United States one Chin Pok as his son whose birth year was given as 1906. When confronted with his testimony in 1907, that he had no children, the alleged father said that Chin Pok was an adopted son. Chin Pok was excluded and, his appeal being dismissed by the Department, deported.

The alleged father who was last in China in 1928, and an alleged acquaintance, who claims to have met the applicant in 1929, appeared to testify. The testimony shows such discrepancies as the following:

The applicant and his alleged father now agree that there is an adobe wall four feet high about three sides of the home village which the alleged father says has been twenty or thirty years. But the alleged father's 1921 record shows that he then testified that there was no wall about his village. Similarly while the applicant and his alleged father now agree that the only well in the village is near the school at the tail of the village in 1921, the alleged father said that the only well in his village was located in front of his row near the other end of his village. The attorney attempts to minimize the damaging force of these discrepancies by saying that whereas the alleged father has been at home for three years, 1925-1928, since 1921, he had been at home only occasionally before 1921, but his record shows that he was in China on four visits prior to 1921 and that the last of them, 1917-1920, was a three year visit.

The alleged father says that all of his three oldest sons were attending school when he went home in 1925 and that none of them started to go to school while he was there. The applicant says that one of these three was not attending school when his father came home and did start in March, 1928. Also while the alleged father says that his son who the applicant claims to be attended school only six days a week when he (the alleged father) was at home last, the applicant declares that he attended school every day, seven days a week.

The alleged father says that his village has sixteen toilets which are located inside the village wall. The applicant says that his village has ten toilets which are located outside the wall of his village. The disagreement is confirmed in diagram approved as correct by the alleged father and the applicant, respectively.

The alleged father says that the widow and mother of a deceased neighbor were living in the house next to his own when he was last in China. The applicant says that the house next to his was occupied by one woman living alone when his father was last at home. The father gives the age of an occupant of the house next door on the other side as twelve whereas the applicant gives that person's age at twenty.

The alleged father testifies that the applicant and Chin Pok, the deportee referred to above, never attended school together in the home village. The applicant testifies that he and Chin Pok attended school together in the home village for two or three years.

In view of the appearance of such discrepancies, which could not reasonably be expected to appear

in a bona fide case, it is not thought that the evidence reasonably established this applicant's claim to be the son of his alleged father. * * *"

(Tr. of R. pp. 29-31.)

The testimony of the appellant and his alleged father is, therefore, said to be discrepant in only four particulars, as follows:

1. The time when one of the alleged father's three oldest sons commenced to attend school.

2. The number and location of the toilet houses in the appellant's home village.

3. The occupants of the houses adjoining the appellant's house.

4. The attendance at school of the appellant with an older brother.

We will discuss the several matters in the order of the enumeration.

---

1. THE TIME WHEN ONE OF THE ALLEGED FATHER'S THREE OLDEST SONS COMMENCED TO ATTEND SCHOOL.

As heretofore noted, the alleged father was last in China between 1925 and September, 1928. He stated, at first, that when he arrived in China in 1925, his three oldest sons had commenced to attend school (Respondent's Exhibit "A," p. 12); the appellant agreed as to two of the oldest sons having commenced, but stated that the third, Chin Git, did not start until March, 1928. (Respondent's Exhibit "A," p. 23.) The father, however, later modified his testimony by

stating that Chin Git commenced to attend school in 1927, and explained that he was mistaken when he first stated that this son had commenced in 1925, because of his momentary failure to realize the difference in the ages between his second and third sons. (Tr. of R. p. 33.) The only question, therefore, is whether or not any sinister motive should be attributed to the alleged father for this modification in testimony whereby he became in substantial agreement with the appellant. In answer, we believe that it may be fairly stated that the ordinary father, especially if he have many children, would be unable to recall, if suddenly asked, the exact year or years in which one or all of his children commenced to attend school, but that he would find it necessary to indulge in mathematical calculation, as by a comparation of the ages of the children, in order to reckon the exact year. Taking, therefore, common experience and observation as a standard of comparison, we submit that the change or modification in the father's testimony was reasonable, rather than the result of deliberate falsehood.

At the very most, the discrepancy involves only a question of dates, that is, as to whether the son, Chin Git, commenced to attend school in 1925 or in 1927, a subject concerning which the mind is particularly frail.

Nagle v. Dong Ming, 26 Fed. (2d) 438.

In *Wong Bing Pon v. Carr,* 41 Fed. (2d) 604, a matter not unlike that here involved was discussed and this Court, at page 605, said:

'* * * The Board of review dismissed from consideration various minor discrepancies, and finally relied upon two (apart from the question of applicant's age) as supporting the finding that the claimed relationship was not established. *The first concerned appellant's statement that he saw his father 2 years ago, when as a matter of fact the father had returned to the United States from China but 6 months prior to appellant's arrival.* It is suggested in argument that further questioning on this subject would have developed the absence of discrepancy as to this point, because of the differences between the Chinese and the American methods of reckoning time. However this may be, appellant was given no opportunity to explain his answer, in the face of the fact that his entire examination showed him to be extremely vague in his ability to fix dates. In view of this failure to pursue the subject, it must be held that this discrepancy is without substance."

---

2. THE NUMBER AND LOCATION OF THE TOILET HOUSES IN THE APPELLANT'S HOME VILLAGE.

According to the Secretary of Labor, the alleged father stated that his village has sixteen toilet houses, which are located inside of the village wall, whereas the appellant stated that the village has ten of these houses, which are located outside the wall. The probability is that there are such houses both on the inside and on the outside of the wall, with perhaps a total of sixteen houses. The matter is unimportant and wholly immaterial to the issue of relationship.

In *Wong Tsick Wye, et al. v. Nagle,* 33 Fed. (2d) 226, C. C. A. 9th., it was held that a discrepancy, *inter alia,* between two applicants, who claimed to be uncle and nephew, who has just arrived from China and who had attended school together in China up to the time of their departure for the United States, as to whether or not there was a storehouse for fuel in back of the schoolhouse, was insufficient to defeat the claimed relationship.

In *Nagle v. Wong Ngook Hong,* 27 Fed. (2d) 650, C. C. A. 9th., it was held that a discrepancy as to the existence of a bridge in the immediate vicinity of the applicant's home village was insufficient to defeat the claimed relationship.

In *Hom Chung v. Nagle,* 41 Fed. (2d) 126, C. C. A. 9th., it was held that a discrepancy between an applicant, who had attended school in China immediately prior to his departure for the United States, and his alleged father, who claimed to have visited the applicant at school on many occasions during a recent visit to China, as to whether the school had five rooms or only one room, was insufficient to defeat the claimed relationship.

---

3. THE OCCUPANTS OF THE HOUSE ADJOINING THE APPELLANT'S HOUSE.

According to the Secretary of Labor, the alleged father stated that a widow and mother of a deceased neighbor were living in the house next to the appellant's house when he was last in China, whereas the appellant, at first, stated that only one lady was living

in this house during the father's last visit to China. The appellant, however, qualified his testimony by stating that two women had lived in that house, but that one of the women had gone away to work. The Secretary of Labor comments upon the appellant's statement, as qualified, as follows:

> "Whereas the alleged father originally testified that opposite the large door of his house two women, the widow and the mother of a deceased neighbor lived, the applicant testified that only one woman, the widow, lived there. Now, the applicant says that the mother went away to work but he originally said that he never saw that woman."
>
> (Tr. of R. p. 35.)

We submit that some allowance must be made for lapse of memory and temporary forgetfulness and that it is hardly fair to conclude that the appellant has deliberately given false testimony merely because he qualifies his original testimony.

In *Gung Yow v. Nagle,* 34 Fed. (2d) 848, at page 852, this Court said:

> "* * * Evidence concerning the town or village of the home is adapted to develop the question as to whether or not the applicant lived in the village and thus in the home from which he claims to come. But discrepancies here must be of the most unsatisfactory kind upon which to base a finding of the credibility of a witness, and when the cross-examiner and the Board of Inquiry know nothing of the actual facts concerning the village, the result is even more unsatisfactory and inconclusive. *It would seem then*

that the discrepancy in the testimony of a witness, to justify a rejection of the testimony, must be on some fact logically related to the matter of relationship and of such a nature that the error or discrepancy cannot reasonably be ascribed to ignorance or forgetfulness, and must reasonably indicate a lack of veracity.''

---

4. THE ATTENDANCE AT SCHOOL OF THE APPELLANT WITH AN OLDER BROTHER.

It appears that the appellant has an older brother, Chin Pok, who applied for admission to the United States in 1921 and who was deported. The alleged father testified that the appellant and Chin Pok did not attend school together in China, whereas the appellant testified that they did go to school together for two or three years. As Chin Pok is claimed to have died in 1922, it is apparent that if these two boys went to school together it was many years ago. After so many years, the alleged father might easily forget the details of the schooling of these boys, especially as to whether or not they actually attended school together. Furthermore, Chin Pok was three years older than the appellant and, naturally, he must have been in a class somewhat farther advanced than was the appellant's class. Perhaps, therefore, the father meant that these two boys were not in the same class together at any time. Finally, it will be borne in mind that the alleged father has been in China at intervals only and therefore his knowledge of the schooling of these boys is based largely upon hearsay, which knowledge, at best, is imperfect.

In *Nagle v. Jin Suey,* 41 Fed. (2d) 523, C. C. A. 9th., there was considered the following discrepancy: the alleged father and his prior landed son testified that the applicant had gone to school at Canton City for three years, whereas the applicant testified that he had never gone to school there. The Court said:

> "* * *. But, assuming the discrepancies touching the schools to be real, they sink into insignificance when compared with the many subjects upon which there is agreement, and some discrepancies are to be expected in the testimony of the most truthful witnesses. Go Lun. v. Nagle (C. C. A.), 22 F. (2d) 246; Nagle v. Dong Ming (C. C. A.), 26 F. (2d) 438."

Although the testimony of the appellant and that of his alleged father is free from material discrepancies, nevertheless, the Secretary of Labor holds that the alleged father is discredited, because in 1921, he was unsuccessful in having a son, Chin Pok, admitted to the United States, it appearing at that time that Chin Pok was an adopted son, rather than a natural son. Of course, if the record were replete with discrepancies, the fact that the alleged father had previously claimed a son, who, according to the record, did not exist, would, no doubt, constitute additional ground for discrediting the alleged father. However, if the record be free from material discrepancies, we do not think that the bare fact that the alleged father was previously unsuccessful in having a son admitted, would constitute ground for discrediting him.

In *U. S. ex rel. Leong Jun v. Day,* 42 Fed. (2d) 714, the Court said:

"At a hearing accorded the applicant for admission in October, 1928, the father, who was born in the United States, testified that he was married and that the applicant is his son. In 1923, when he returned from China, he testified he was not married and that he did not have a marriage name. He now states that he so testified in 1923 because he was 'scared.'

This is the only substantial discrepancy that appears in the record of the hearings to which the father and son were subjected separately.

The fact that the father testified falsely in 1923 evidently cannot deprive the applicant of his right to admission if he is the son of an American citizen."

The Secretary of Labor, also, urges that the alleged father testified in 1921 that his village was not surrounded by a wall, whereas he testified in the appellant's case that there was an adobe wall around the village. The alleged father explained that his 1921 testimony related to an embankment, rather than a wall. (Respondent's Exhibit "A," p. 13.) We, therefore, believe that the difference in testimony is largely due to misinterpretation, for which some allowance must be made.

Hom Chung v. Nagle, 41 Fed. (2d) 126, at page 129. Furthermore, in the same case, at page 127, it was said:

"* * *. The immigration records show that the father departed from the United States for China on October 24, 1914, and again on June 14, 1923, and returned to the United States from China on December 24, 1915, and on May 19, 1925. *As he*

*remained in China during these periods of absence, aggregating about three years, it may be assumed that he testified truthfully to the name of the village in which he lived during his absence, and that he is reasonably familiar with such village which he testifies contains only twelve houses. * * *"*

CONCLUSION.

The testimony in this case is in complete, as well as convincing, accord, and it bears no indication of having been the mere product of coaching. The appellant and the father have testified in considerable detail, and at considerable length, in describing their past relations and associations together, as father and child, on occasions when the father happened to pay visits to his home. The unimportant variations in this testimony, upon which the board has seized in an effort to accomplish the rejection of this appellant and his return to China, have but the remotest kind of a bearing upon the issue of relationship in the case, and they pale into utter insignificance when considered in the light of the record, as a whole, supplemented by the past claims of the father, made on varied and numerous occasions, that he has a son of the name of this appellant, born on the precise date that the appellant claims as his birth date.

Furthermore, the testimony offered to establish the identity of this appellant as the son, whom Chin Kim, his alleged father, has so often alluded to in the past, is supplemented by several letters, which the father

exhibited to the Board of Special Inquiry as having been received from the appellant and by an old photograph of the appellant, which the latter sent to the father in the year 1922.

In *Louie Poy Hok v. Nagle,* No. 6349, decided April 6, 1931, this Court said:

> "The exact details as to the date on which applicant went to a neighboring village to enter a higher school are of minor importance and failure to agree does not discredit the testimony of the father or of the alleged son. Upon such particulars discrepancies are bound to occur.
>
> If the circumstances respecting which the testimony is discordant be immaterial, and of such a nature that mistakes may easily exist, and be accounted for in a manner consistent with the utmost good faith and probability, there is much reason for indulging the belief that the discrepancies arise from the infirmity of the human mind rather than from deliberate error. Nagle v. Dong Ming, 26 F. (2d) 438, C. C. A. 9th.
>
> Of similar character is the discrepancy between the testimony of Louie Poy Hok, the alleged father, and the applicant as to where the latter slept. The alleged father claimed that during his last visit to China the son slept in the room with his father and mother, whereas the alleged son claims that he slept at school during that time. It is interesting that such a discrepancy arises very often in the course of questioning of Chinese applicants for admission and the disagreement in so many cases seems inexplicable. The weight given to this discrepancy, however, must be considered only in its relation to the texture of the testimony as a whole. Wong Tsick Wye v. Nagle,

supra; Ng Yuk Ming v. Tillinghast, supra; Hom-Chung v. Nagle, 41 Fed. (2d) 126, C. C. A. 9th."
Weedin v. Lee Gan, No. 6334, C. C. A. 9th, decided March 16, 1931.

It is respectfully asked that the order of the Court below denying the petition for a writ of habeas corpus be reversed.

Dated, San Francisco,
May 11, 1931.

Respectfully submitted.
STEPHEN M. WHITE,
Attorney for Appellant.

No. 6426

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

CHIN CHING,
Appellant,

vs.

JOHN D. NAGLE as Commissioner of Immigration for the Port of San Francisco, California,
Appellee.

BRIEF FOR APPELLEE

GEORGE J. HATFIELD,
United States Attorney,

WILLIAM A. O'BRIEN,
Ass't United States Attorney,

Attorneys for Appellee.

Neal, Stratford & Kerr, S. F.

SUBJECT INDEX

TABLE OF AUTHORITIES

No. 6426

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

CHIN CHING,

Appellant,

vs.

JOHN D. NAGLE as Commissioner of Immigration for the Port of San Francisco, California,

Appellee.

BRIEF FOR APPELLEE

A.

STATEMENT OF THE CASE

This is an appeal from an order of the District Court for the Southern Division of the Northern District of California, denying appellant's petition for a writ of habeas corpus. (Tr. 38.)

B.

FACTS OF THE CASE

The appellant is a male Chinese, age 22 years, who was denied admission into the United States by a board of special inquiry on the ground that he had not satisfactorily established that he is the son of Chin Kim, an American citizen. (Tr. 16 to 27, inclusive.) That

decision was affirmed on appeal by the Secretary of Labor. (Tr. 29 to 36, inclusive.)

C.

ARGUMENT

1. THE EXCLUDING DECISION OF THE IMMIGRATION AUTHORITIES IS NOT ARBITRARY OR CAPRICIOUS.

The single question before the court below and now before this court is "whether the evidence submitted in the application for admission so conclusively established the alleged relationship that the order of exclusion should be held arbitrary or capricious." (Jew Theu v. Nagle, (C. C. A. 9) 35 F. (2d) 858; Jue Yim Ton v. Nagle, (C. C. A. 9) No. 6291, decided April 6, 1931.)

Appellant in his brief has omitted all reference to the most vital features upon which the excluding decision of the executive officers is based, and has failed to mention the final decision of the Secretary of Labor after a rehearing granted to the applicant, which final decision appears at pp. 32 to 36 of the transcript.

The first very vital point which appellant has overlooked is the fact that Chin Kim, appellant's alleged father, is utterly discredited as a witness by contradictory testimony over a period of years.

On February 25, 1907, when returning from China, the alleged father testified as follows:

"Q. Have you any children?

A. No." (Respondent's Exhibit "D," p. 5.)

In 1921 the alleged father attempted to bring an

alleged son, Chin Pok, into the United States and at that time he testified that Chin Pok was his son by his first wife and that Chin Pok was born on October 2, 1906. He denied that he had testified on February 25, 1907, that he had no children and stated "I think there must be a mistake made in the writing because my son was born several months before I left home." (Respondent's Exhibit "C," pp. 12-11.)

On June 22, 1921, in connection with the same matter, the alleged father, after much evasion, and after being confronted with his testimony of 1907, testified as follows:

> "*This is an adopted son.* The mother of Chin Pok was Luey Shee *and not my wife.* Shortly after the birth of this boy, the mother became ill and my wife was asked to go and bring the child to our house. His mother died about a month and a half after his birth and my wife and I adopted him.
>
> * * * * * * * *
>
> Q. How do you account for the fact that on June 4th you stated that the applicant was the son of your first wife, Louie Shee?
>
> A. I thought if we had adopted him that it would be all right to say that she was his mother." (Respondent's Exhibit "C," pp. 27 and 26.)

The alleged father was then confronted with his testimony of May 13, 1920, wherein he testified that he had no adopted children, and denied that he ever made such a statement, although the records show that on May 13, 1920, when returning from a previous visit to China, he testified as follows:

> "Q. Have you ever had any adopted children?
> A. No." (Resp. Exhibit "D," p. 42.)

In view of this situation the decision of this court in the case of

Quan Wing Seung v. Nagle, 41 F. (2d) 58,

is decisive of the matter. In that case this court said:

> "In 1911 the alleged father testified that he had no children, whereas in 1925 he testified that he had a son, Quan Kim Wing, who was born in 1906, and who was then seeking admission as his son. The record is replete with alleged discrepancies, *but in view of the false testimony given by the father in an effort to secure the admission of an alleged son we cannot say that a fair hearing was denied because the Immigration authorities did not believe his testimony in the present instance.*"

Accord:

> *U. S. ex rel Fong Lung Sing v. Day,* (C. C. A. 2) 37 F. (2d) 36 at 38;
>
> *U. S. ex rel Soy Sing v. Chinese Inspector,* (C. C. A. 2) 47 F. (2d) 181 at 184.

In fact, in the case at bar, the contradictions are even more striking than in the cases cited, because the alleged father not only testified in 1907 that he had no children and in 1921 that he had a son born in 1906 by his first wife, but he also admitted in 1921 that he had testified falsely then, saying "I thought if we had adopted him that it would be all right to say that she was his mother." Furthermore, he had testified in 1920, just a year before, that he never had any adopted children.

It is also settled that where the alleged father has testified falsely, and for that reason his credibility as a witness is impaired, the testimony of the applicant

himself will not impel a favorable finding on the part of the Immigration authorities.

Nagle v. Wong Dock, (C. C. A. 9) 41 F. (2d) 476 at p. 478;
Weedin v. Ng Bin Fong, (C. C. A. 9) 24 F. (2d) 821;
U. S. ex rel Fong Lung Sing v. Day, supra;
U. S. ex rel Soy Sing v. Chinese Inspector, supra.

The testimony of the two alleged acquaintances of the applicant is without probative value on the issue of the appellant's paternity. Lee Yew claims to have seen the applicant only twice, viz., in November, 1928, and in September, 1929. (Resp. Exhibit "A," pp. 18 and 19.)

Lim Wing claims to have first met the applicant in January, 1928, in China and to have seen him five or six times since. (Resp. Exhibit "A," pp. 78 and 79.)

Speaking of similar testimony of a witness who claimed to have visited the home of an applicant on three occasions, Circuit Judge Deitrich, in his concurring opinion in

Weedin v. Lee Gock Doo, 41 F. (2d) 129 at p. 131,

said:

> "If it be granted that the corroborating witness Wong Ben Yook testified in good faith, his testimony is without substantial probative value."

Accord:

U. S. ex rel Soy Sing v. Chinese Inspector, supra.

It is therefore settled under very recent decisions of this court and other courts that upon such a record as

is here involved it cannot be said that the decision of the Immigration authorities denying the applicant admission is arbitrary or capricious, and certainly there is no error in the decision of the court below which found that no arbitrary or capricious action had been shown.

Appellant cites

> *U. S. ex rel. Leong Jun v. Day* (D. C.) 42 F. (2d) 714.

That case, however, is not only in conflict with the decisions of the Circuit Court of Appeals for that circuit which we have cited above, but was decided on the authority of

> *Ex Parte Ng Bin Fong,* (D. C.) 20 F. (2d) 1014,

which case was reversed on appeal by this court:

> *Weedin v. Ng Bin Fong,* 24 F. (2d) 821.

In the case last cited the alleged father of the appellee admitted that certain testimony he had previously given as to the manner of his entry into Canada was untrue. This court said:

> "Clearly, under such circumstances, the Immigration officers were not bound to believe his testimony."

And relative to the testimony of the appellee himself, the court said:

> "Being an interested witness, his testimony alone would not, as a matter of law, make it incumbent upon the Immigration officers to believe or admit him."

Appellant leans heavily upon the fact that the alleged father claimed in 1913, in 1920, and in 1928 that

he had a son of the name and age claimed by the appellant. However, in

Nagle v. Wong Dock, supra,

this court held that if, as a result of discrepancies, the testimony of the alleged father were rejected, "this would carry with it the cumulative effect of his declaration made to the Immigration authorities on previous occasions that he had three sons as the result of his marriage with Hom Shee whose names and ages correspond with the names and ages of the three alleged brothers."

Appellant also devotes considerable space to a statement of matters regarding which appellant and his alleged father were in agreement.

In

Nagle v. Quon Ming Him, 42 F. (2d) 450,

this court said:

> "The effect of discrepancies such as these must be determined from an examination of the entire record. Such an examination in this case shows that in all probability the appellee and his alleged prior landed brothers were related, or at least were acquainted, and the testimony of the alleged father and his two alleged sons show that they were more or less familiar with the home village and its inhabitants, but such testimony does not necessarily tend to show relationship, or to overcome the effect of the discrepancies to which we have referred."

In view of the condition of the record as set forth above, it would seem to be unnecessary to discuss the other contradictions in the testimony which was offered before the Immigration authorities in appellant's behalf, and the contradictions between that testimony and

the testimony offered in 1921 when his alleged brother, Chin Pok, was applying for admission into the United States.

Appellant in his brief has contented himself with discussing a few of the disagreements which were mentioned in the first decision of the Secretary of Labor. He has not discussed the numerous changes in the testimony of the alleged father and the applicant which are mentioned in the final finding of the Secretary of Labor after the rehearing.

The alleged father testified that the village from which the parties claim to come consists of 16 houses and a school and is surrounded on three sides by an adobe wall about 4 feet high, which has been there for 20 or 30 years (Resp. Exhibit "A," p. 13), and with this testimony the appellant agreed. (Resp. Exhibit "A," pp. 24 and 25.) However, in 1921, in connection with the application of Chin Pok, the alleged father testified as follows:

> "Q. Is there a wall at your village?
> A. No." (Resp. Exhibit "C," p. 10.)

And later, on recall in that case, as follows:

> "Q. You stated there was no wall of any kind at your village. Is that right?
> A. There is not." (Resp. Exhibit "C," p. 5.)

Similarly the alleged father and the applicant described and pictured the only well in the village as being in front of the school at the extreme west of the village and agreed that there has never been a well directly in front of the row in which their home is located. (Respondent's Exhibit "A," pp. 24 and 25,

and Exhibit "D," pp. 1 and 2.) However, in 1921 the alleged father testified that the well was a short distance in front of his row. (Respondent's Exhibit "C," p. 10.)

Again the alleged father testified on June 20, 1930, as follows:

> "Q. While you were home on your last visit, what other sons of yours were attending school in the home village?
>
> A. My 2nd and 3rd sons, CHIN SAM and CHIN GIT.
>
> Q. Did either of these boys enter school while you were home on your last visit?
>
> A. No, they all started to school before I arrived home." (Resp. Ex. "A," p. 12.)

The applicant testified as follows:

> "CHIN GIT started to school in CR 17 about the 2nd month (March, 1928) after my father had arrived home on his last trip." (Resp. Ex. "A," p. 23.)

After an excluding decision had been entered by the Board of Special Inquiry and had been affirmed on appeal by the Secretary of Labor, the case having later been ordered reopened to accept the testimony of the additional witness, LIM WING, the alleged father filed an affidavit wherein he deposed in part as follows:

> "That affiant had previously testified that his third son, Chin Git, had started to school before your affiant last returned to China in 1925, whereas the son named started to school at the age of eight years, or in the year 1927, *this mistake on the affiant's part having occurred through his momentary failure to realize the difference in ages between his second and third sons,* the former having entered school prior to affiant's arrival in China because of his greater age." (Resp. Ex. "A," p. 69.)

This is not only a case of "agreement subsequently arrived at" *(Weedin vs. Lee Gock Doo,* supra), but the affidavit is a tacit admission that the alleged father was testifying from a concocted story. Obviously the alleged father should have no need to indulge in mathematical calculation before testifying as to whether his third son had already started to school when he arrived in China on his last visit.

There are further changes of the same character. The alleged father testified on June 29, 1930, as follows:

> "Q. Did the applicant and CHIN POK ever attend school together in the home village?
> A. No." (Resp. Ex. "A," p. 15.)

The applicant testified as follows:

> "Q. Did you ever attend school with your alleged foster brother, CHIN POK?
> A. Yes, the village school.
> Q. How long did you attend school with him?
> A. About 2 or 3 years." (Resp. Ex. "A," p. 23.)

After the matter was reopened the alleged father testified on September 18, 1930, as follows:

> "My sons, CHIN PAK and CHIN JUNG (CHING), went to school together for three years." (Resp. Ex. "A," p. 76.)

Likewise the diagrams prepared by the applicant and the alleged father disagreed as to the occupants of the houses at the north end of the second and third rows in the village, their positions being reversed in the respective diagrams. (Resp. Ex. "B," pp. 1 and 2.)

In his affidavit subsequently filed, the alleged father deposed as follows:

> "In stating the occupants of the fourth houses in affiant's, and the adjoining row of houses, affiant incorrectly reversed the order of such occupants, Chin Choon being the actual occupant of the fourth house in affiant's row and Chin Sing occupying the identical house in the adjoining row." (Resp. Ex. "A," p. 70.)

There are several other contradictions and changes of the same character, which are set forth in the two summaries of the Board of Review (Resp. Ex. "A," pp. 54, 53; 99, 98.)

It is well settled in these cases that such "agreement among the witnesses subsequently arrived at may itself be considered to be a circumstance casting doubt upon the veracity of the witnesses."

Weedin v. Lee Gock Doo, (C. C. A. 9) 41 F. (2d) 129;

Moy Chee Chong v. Weedin, (C. C. A. 9) 28 F. (2d) 263;

Siu Say v. Nagle, (C. C. A. 9) 295 Fed. 676.

These numerous changes in the testimony of the parties designed to bring themselves into subsequent agreement are not touched upon in appellant's brief. However, in view of the features pointed out above, we deem it unnecessary to go into further detail.

We submit that no error has been shown in the order appealed from, and that it should be affirmed.

GEORGE J. HATFIELD,
United States Attorney,

WILLIAM A. O'BRIEN,
Ass't United States Attorney,

Attorneys for Appellee.